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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 15, Miscellaneous

**FAR EASTERN CONFERENCE, UNITED STATES
LINES COMPANY, STATES MARINE CORPORA-
TION, ET AL., PETITIONERS.**

vs.

**THE UNITED STATES OF AMERICA AND FEDERAL
MARITIME BOARD**

**ON WRIT OF CERTIORARI UNDER 28 U.S.C. 1651 TO THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

**MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI
FILED JUNE 2, 1951.**

**MOTION FOR LEAVE TO FILE AND PETITION FOR WRIT OF CERTI-
ORARI GRANTED OCTOBER 8, 1951.**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

FAR EAST CONFERENCE, UNITED STATES LINES
COMPANY, STATES MARINE CORPORATION, ET
AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA AND
FEDERAL MARITIME BOARD

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI
UNDER U. S. C. 1651

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[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY**

Civil Action No. 11546

UNITED STATES OF AMERICA, Plaintiff,

v.

FAR EAST CONFERENCE, UNITED STATES LINES COMPANY,
STATES MARINE CORPORATION, M. V. NONSUCO INC., LANCA-
SHIRE SHIPPING CO., LTD., SKIBSAKTIESELSKAPET IGADÉ, A.
F. KLAVENESS & CO. A/S, THE DE LA RAMA STEAMSHIP
CO., INC., WATERMAN STEAMSHIP CORPORATION, PRINCE
LINE, LTD., LYKES BROS. STEAMSHIP CO., INC., AMERICAN
PRESIDENT LINES, LTD., SWEDISH EAST ASIATIC CO., LTD.,
NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N.
V., AKTIESELSKAPET IVARANS REDERI, ISTHMIAN STEAMSHIP
COMPANY, ELLERMAN & BUCKNALL STEAMSHIP CO., LTD.,
FEARNLEY & EGER, WILHELMSENS DAMPSKIBSAKTIESELSKAB,
DAMPSKIBSSELSKABET AF 1912 A/S, THE BANK LINE, LTD.,
THE CHINA MUTUAL STEAM NAVIGATION CO., LTD., SILVER
LINE, LTD., THE OCEAN STEAMSHIP COMPANY, LTD., A/S
BESCO, A/S DAMPSKIBSSELSKABET SVENDBORG, Defendants

COMPLAINT—Filed August 6, 1948

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above-named defendants and alleges:

[fol. 2]

I.

Jurisdiction and Venue

1. This complaint is filed and the jurisdiction of this court is invoked under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended, commonly known and hereinafter referred to as the Sherman Antitrust Act, against the above-named defendants in order to prevent and restrain continuing violations by them, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of said Act.

2. The unlawful attempts to monopolize, combinations and conspiracies to monopolize, monopolization, and contracts, combinations and conspiracies to restrain trade and commerce of the United States with foreign nations, as more fully hereinafter described, have operated and have been and are being carried out in part within the District of New Jersey. Defendant United States Lines Company was organized and exists under the laws of the State of New Jersey, within said District, has its usual place of business within said District, and transacts business therein.

II

Description of Defendants

3. Defendant Far East Conference is a voluntary association and organization of steamship lines. Said defendant has its office and principal place of business at 11 Broadway, New York, New York.

[fol. 3] 4. Defendant American President Lines, Ltd., is a corporation organized and existing under the laws of the State of Delaware and has its principal office at 311 California Street, San Francisco, California.

5. Defendant The Bank Line, Ltd., is a corporation organized and existing under the laws of Scotland and maintains an office for the transaction of business at 24 State Street, New York, New York.

6. Defendant The China Mutual Steam Navigation Co. Ltd., is a corporation organized and existing under the laws of England and maintains an office for the transaction of business at 24 Broadway, New York, New York.

7. Defendant Dampskibsselskabet af 1912 A/S, is a corporation organized and existing under the laws of Denmark and maintains an office for the transaction of business at 30 Broad Street, New York, New York.

8. Defendant A/S Dampskibsselskabet Svendborg, is a corporation organized and existing under the laws of Denmark and maintains an office for the transaction of business at 30 Broad Street, New York, New York.

9. Defendant The De La Rama Steamship Co., Inc., is a corporation organized and existing under the laws of the Philippines and has its principal office at 90 Broad Street, New York, New York.

10. Defendant Ellerman & Bucknall Steamship Co., Ltd., is a corporation organized and existing under the laws of

Great Britain and maintains an office for the transaction of business at 26 Beaver Street, New York, New York.

[fol. 4] 11. Defendant Fearnley & Eger, is a corporation organized and existing under the laws of Norway and maintains an office for the transaction of business at 44 Whitehall Street, New York, New York.

12. Defendant A. F. Klaveness & Co. A/S, is a corporation organized and existing under the laws of Norway and has its principal office at 310 Sansome Street, San Francisco, California.

13. Defendant Isthmian Steamship Company, is a corporation organized and existing under the laws of the State of Delaware and maintains an office for the transaction of business at 71 Broadway, New York, New York.

14. Defendant Skibsaktieselskapet Igadi, is a corporation organized and existing under the laws of Norway and maintains an office for the transaction of business at 17 Battery Place, New York, New York.

15. Defendant A/S Beseo, is a corporation organized and existing under the laws of Norway and maintains an office for the transaction of business at 17 Battery Place, New York, New York.

16. Defendant Aktieselskapet Ivarans Rederi, is a corporation organized and existing under the laws of Norway and maintains an office for the transaction of business at 17 Battery Place, New York, New York.

17. Defendant Lancashire Shipping Co. Ltd., is a corporation organized and existing under the laws of the United Kingdom and maintains an office for the transaction of business at 17 Battery Place, New York, New York.

18. Defendant Lykes Bros. Steamship Co., Inc., is a corporation organized and existing under the laws of the State [fol. 5] of Louisiana and has its principal office at 925 Whitney Building, New Orleans, Louisiana.

19. Defendant Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., is a corporation organized and existing under the laws of the Philippines and maintains an office for the transaction of business at 17 Battery Place, New York, New York.

20. Defendant M. V. Nonsuco Inc., is a corporation organized and existing under the laws of the Philippines and maintains an office for the transaction of business at 19 Rector Street, New York, New York.

21. Defendant The Ocean Steamship Company, Ltd., is a corporation organized and existing under the laws of Great Britain and maintains an office for the transaction of business at 25 Broadway, New York, New York.

22. Defendant Prince Line, Ltd., is a corporation organized and existing under the laws of England and maintains an office for the transaction of business at 34 Whitehall Street, New York, New York.

23. Defendant Silver Line, Ltd., is a corporation organized and existing under the laws of England and maintains an office for the transaction of business at 17 Battery Place, New York, New York.

24. Defendant States Marine Corporation, is a corporation organized and existing under the laws of the State of New York and maintains an office for the transaction of business at 90 Broad Street, New York, New York.

25. Defendant Swedish East Asiatic Co., Ltd., is a corporation organized and existing under the laws of, the [fol. 6] Philippines and has its principal office at 90 Broad Street, New York, New York.

26. Defendant United States Lines Company, is a corporation organized and existing under the laws of the State of New Jersey and has its principal office at 51 Newark Street, Hoboken, New Jersey.

27. Defendant Waterman Steamship Corporation, is a corporation organized and existing under the laws of the State of Alabama and has its principal office at Merchants National Bank Building, Mobile, Alabama.

28. Defendant Wilhelmsens Dampskibsaktieselskab, is a corporation organized and existing under the laws of Norway and maintains an office for the transaction of business at 17 Battery Place, New York, New York.

III

The Trade and Commerce Involved

29. Each of the corporate defendants is engaged as a common carrier by water in the transportation of property in foreign trade from the Atlantic Coast and Gulf ports of the United States to the ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China, and the Philippine Islands, hereinafter sometimes called the "outbound Far East trade." The corporate defendants are associated

together in the defendant Far East Conference, under an agreement known as United States Maritime Commission Conference Agreement No. 17, approved November 14, 1922, under the provisions of Section 15 of the Shipping Act, 1916, as amended. A true copy of said Agreement, as amended to December 4, 1947, is attached to this complaint as Exhibit A, and is made a part hereof. The membership, [fol. 7] of the defendant Far East Conference includes all but one of the common carrier shipping lines regularly engaged in the transportation of property in the outbound Far East trade and the members of the defendant Far East Conference carry virtually all the commercial tonnage transported by shipping lines engaged in that trade.

30. The principal commodities transported by defendants in the outbound Far East trade are industrial machinery, agricultural machinery and equipment, road building machinery, electrical machinery and fixtures, automobiles, office equipment, textiles, steel and iron products, paper products, petroleum products, fertilizer and other manufactured goods and products of American industry and agriculture.

Offenses Charged

31. Defendants have for several years past unlawfully combined and conspired, and have, and are now, engaged in an unlawful combination and conspiracy in restraint of trade and commerce of the United States with foreign nations in the transportation of property in the outbound Far East trade in violation of Section 1 of the Act of July 2, 1890, as amended, known as the Sherman Antitrust Act; and defendants have for several years past unlawfully combined and conspired, and have, and are now, engaged in an unlawful combination and conspiracy to monopolize, and have attempted and are now attempting to monopolize, and have monopolized said trade and commerce in violation of Section 2 of the Act of July 2, 1890, as amended, known as the Sherman Antitrust Act.

[fol. 8] 32. The aforesaid combination and conspiracy to restrain trade and commerce of the United States with foreign nations, the combination and conspiracy to monopolize, attempts to monopolize, and monopolization of such trade and commerce, consist of a continuing agreement and concert of action among the defendants to control the transportation of all cargo in the outbound Far East trade

by establishing and maintaining a system of "contract rates" and higher "non-contract rates," the sole consideration for the enjoyment of the lower "contract rates" being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade.

33. By their combined economic power, exerted through the aforesaid coercive rate differentials, the defendants have, pursuant to the combination and conspiracy herein alleged, induced and compelled shippers in the outbound Far East trade to enter into freight agreements with the defendant Far East Conference, for and on behalf of its members, obligating such shippers to patronize members of the defendant Far East Conference exclusively, and have enforced the said obligation of such shippers by threatening the withdrawal of "contract rates" and the imposition of oppressive fines and penalties for any deviation by such shippers from the terms of said agreement. A true copy of the form of said freight agreements, revised as of August 15, 1945, is attached to this complaint as Exhibit B, and is made a part hereof.

[fol. 9] 34. The purpose and object of the aforesaid combination and conspiracy has been and is to drive out of and exclude from participation in the outbound Far East trade, and to eliminate from competition therein, steamship lines not parties to said unlawful combination and conspiracy, and thereby to achieve and maintain a monopoly of the transportation of cargo in said trade.

35. Through the aforesaid exclusive patronage contracts and the threat of oppressive fines and penalties for deviation therefrom, the defendants have eliminated competition in the transportation of cargo in the outbound Far East trade and have thereby unlawfully restrained and monopolized the foreign trade of the United States from its Atlantic and Gulf ports to the ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippine Islands.

IV

Effects of the Conspiracy

36. The unlawful combination and conspiracy in restraint of trade, combination and conspiracy to monopolize, at-

tempts to monopolize, and monopolization described above have, as intended by the defendants, prevented other shipping lines from competing with the defendants in the outbound Far East trade:

Prayer

WHEREFORE, the Plaintiff prays:

1. That a summons issue to each of the defendants commanding each of them to appear herein and to answer the [fol. 10] allegations contained in this complaint and to abide by and perform such orders and decrees as the Court may make in the premises;

2. That upon final hearing of this cause, the Court order, adjudge and decree that the combination and conspiracy herein described exist and constitute an attempt to monopolize, combination and conspiracy to monopolize, and monopolization, and an unreasonable and unlawful restraint of the trade and commerce of the United States with foreign countries in violation of Sections 1 and 2, of the Sherman Antitrust Act;

3. That the defendants herein and each of them, and their officers, directors, representatives, agents, and all persons and corporations acting or claiming to act on behalf of them, be perpetually enjoined and restrained from monopolizing, attempting to monopolize, combining and conspiring to monopolize, or agreeing, conspiring or combining to restrain the trade and commerce of the United States in the manner and by the means described herein;

4. That the exclusive patronage contracts be cancelled, and that the defendants be perpetually enjoined from entering into any other contracts or participating in agreements, understandings, practices or arrangements having a tendency to continue or revive any of the aforesaid violations of the Sherman Antitrust Act.

5. That the defendants be required, within 60 days from the date of the judgment to be entered herein, to send to each shipper which is a party to one of the said exclusive patronage contracts a true copy of such judgment, and at [fol. 11] the same time, in a form approved by the Court, to notify each such shipper that its contract has been cancelled and that it may make shipments by any line without incurring the fines and penalties provided in said contract.

6. That plaintiff have such other and further relief as the nature of the case may require and as to the Court may seem proper; and

7. That plaintiff recover its costs of this suit.

James E. Kilday, Special Assistant to the Attorney General; Joseph E. McDowell, Trial Attorney; Carolyn R. Just, Attorney.

Tom C. Clark, Attorney General; Herbert A. Bergson, Assistant Attorney General; Isaiah Matlack, United States Attorney.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 12]

EXHIBIT A TO COMPLAINT

Far-East Conference Agreement

This Memorandum of Agreement, made in the City of New York, by and between the parties signatory hereto, on the first day of September in the year one thousand nine hundred and twenty-two.

Witnesseth:

That the parties hereby associate themselves together in a Far-East Conference, to promote commerce between the North Atlantic, South Atlantic and Gulf ports of the United States of America and the ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China, and the Philippine Islands, for the common good of shippers and carriers, by providing just and economical co-operation between the steamship lines operating in such trades; and to the accomplishment of that end the parties hereby severally agree with each other as follows:

1. All freight or other charges for the transportation of cargo between the aforementioned ports shall be charged and collected by the parties hereto strictly in accordance with the tariff of rates and charges agreed to by the parties.

¹ Preamble as modified by Conference Agreements Nos. 17-3 and 17-4 approved December 18, 1929, and September 3, 1930.

2. There shall be no unjust discrimination against, and no rebates of freight or compensation shall be paid to, any shipper, contractor, broker, consignee, or other receiver of merchandise, by any of the parties hereto.

[fol. 13] 3. No cargo shall be accepted for carriage at less than its actual gross weight or measurement as provided in the tariffs, and no payment of freight shall be received in any currency other than that of the United States, or its equivalent, by any of the parties hereto.

4. There shall be no payment or refund in respect of freight or compensation received, and no absorption at loading or discharging ports of rail or coastal steamer freights or other charges, directly or indirectly, by any of the parties hereto.

5.² No freight brokerage shall be paid in excess of one and one-quarter per cent ($1\frac{1}{4}\%$) on the amount of freight earned by the initial carrier, but not including transshipment freight, unless otherwise authorized by a majority of the parties hereto at a regular meeting of the Conference.

6. The parties hereto shall meet together regularly in conference on the first and third Wednesdays of each calendar month, at 11:00 A. M., in rooms in the City of New York to be designated by the Chairman of the Conference. If any regular meeting falls on a legal holiday, the meeting shall be held at the same hour and place on the next business day.

7.³ The Conference shall, by a vote of two-thirds of their number, select a Chairman who shall not be interested in or employed by, or in any way connected with, any member of the Conference or any agent or any representative thereof. Such Chairman shall be elected to serve for such period of time and at such rate of compensation as shall be fixed in the agreement between the Chairman and the members of the Conference. The Chairman shall be the executive officer of the Conference and shall preside over the meetings of the Conference and shall be, ex officio, a member of any and all standing and special committees of the

² Article 5 as modified by Conference Agreement No. 17-5 approved May 20, 1931.

³ Article 7 as modified by Agreement 17-11 approved March 19, 1946.

Conference. The Chairman shall designate the representatives of the members who shall constitute any and all committees that may be authorized by Conference action. All determinations by the Conference shall be communicated to the shippers exclusively by the Chairman. The Chairman shall have access to such records, in the offices and on the piers of the parties hereto, the inspection of which by him shall be reasonably necessary to enable him to determine that the members of the Conference are respectively abiding by the terms and provisions of this agreement, and the right to make such copies of, and extracts and transcripts from, such records as he may determine advisable, and each of the parties hereto agrees to furnish to the Chairman, or to such persons as he may designate for said purpose, such access and such right. In addition to or in modification of the duties and authorities in this Agreement provided, the Chairman shall have such other or different authority and duties as shall be fixed and determined by a vote of two-thirds of the members of the Conference. The Chairman shall employ a Secretary, subject to the approval of the Conference, who shall act as the Secretary of the Conference. The Secretary shall keep a minute record of the proceedings of all meetings, including all votes on matters coming before the Conference, and shall otherwise act in accordance with the direction of the Chairman. Copies of all minutes, records, tariffs, regulations and other documents, shall be furnished to the members of the Conference by the Chairman upon the request therefor in writing, and shall be furnished by the Chairman to the governmental agency for the time being charged [fol. 15] with the administration of the Shipping Act, 1916, as amended.

8.4 The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freights, brokerages, or other charges, or the regulation of transportation between the aforementioned ports at any meeting of the Conference, provided that notice in writing, descriptive of the matter to be considered, has been given each party hereto by the Secretary, at the direction of the Chairman, at not later than 4 P. M. of the day prior to the date of meeting; and the Chairman shall cause such notice to be

* Article 8 as modified by Agreements 17-5 approved May 20, 1931, and Agreement No. 17-11 approved March 19, 1946.

given on the request of any party hereto made in writing to the Chairman not later than 11:00 A. M. of the day prior to the date of meeting. If all of the parties hereto are present at any meeting, action may be taken on any matter within the scope of this agreement without prior notice thereof. Any matter or thing brought before the meeting in the manner aforesaid and agreed to by a majority of the parties hereto, shall thereby become an agreement binding upon all of the parties hereto, with the same force and effect as if expressly made a part of this agreement.

9.⁵ Pursuant to recommendations made by the Chairman, or pursuant to the recommendation of any Committee or Sub-Committee authorized by a majority vote of the parties [fol. 16] hereto and appointed as provided in Article 7 hereof, or without any recommendation, the parties shall establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the agreement by the affirmative vote of the majority of their number, at any meeting held in accordance with the provisions of Article 8 hereof, and all of the parties hereto agree that they will be bound by the affirmative vote of the majority of their number upon the matters aforesaid with the same force and effect as if expressly made a part hereof.

10. The parties hereto each agree to deposit with the Chairman the sum of \$25,000.00 in United States Government Bonds, or in cash, which shall be deposited or invested as may be agreed by a majority of the parties hereto at any regular meeting of the Conference, and the interest accruing thereon shall be paid to the parties making such deposit, immediately upon receipt of such interest by the Chairman.

Any Party which has deposited cash or United States Government Bonds, as aforesaid, may, upon notification to,

⁵ Article 9 as modified by Conference Agreements Nos. 17-5, 17-9, and 17-11, approved May 20, 1931, May 10, 1934, and March 19, 1946, respectively. Article 10 as modified by Conference Agreements Nos. 17-1, 17-5, 17-7, and 17-8 approved September 7, 1927, May 20, 1931, February 3, 1932, and January 25, 1933. Suspended for duration of hostilities by Conference Agreement 17-10 approved June 11, 1942; reinstated and amended by agreement No. 17-16, approved July 16, 1946.

and under approval of the Conference, substitute therefor \$25,000 in other bonds, provided, however, that the party making the substitution hereby agrees upon call of the Conference to supplement or revise such substitute deposit to a minimum ready market value of \$25,000 U. S. currency.

Subject to the acceptance and approval by the Conference, any party to this Agreement may deposit a surety bond in the amount of \$25,000 in lieu of cash or bonds hereinbefore provided for.

11. Inasmuch as it will be impossible to ascertain or measure the amount of damages which the parties hereto will suffer by reason of the breach of this agreement, the parties hereto expressly agree that the damages suffered [fol. 17] thereby by each party hereto shall be, and they hereby are, liquidated at a prorata part, based on the number of parties hereto, not including the party committing the breach, of a sum equal to four times the amount of freight moneys, or other compensation, which the party committing such breach shall receive for the transportation of any cargo with respect to which such breach shall occur.

12.^a The parties hereto agree to submit at any time the question as to whether this agreement has been breached by any of them, and the amount of damages thereby suffered by the other parties, to the determination of the Arbitration Committee of the New York Produce Exchange, as provided in an act entitled "An Act to Incorporate the New York Commercial Association," passed April 19, 1862, and being Chapter 359 of the Laws of 1862 of New York, as amended by an act entitled "An Act to amend Chapter 359 of the Laws of 1862, entitled 'An Act to Incorporate the New York Commercial Association', in relation to the powers and duties of the Arbitration Committee of such corporation, now known as New York Produce Exchange", passed April 12, 1912, and being Chapter 291 of the Laws of 1912 of New York; or, in lieu thereof, if the Chairman and the party charged with the breach so agree in writing, the question of breach and damages shall be left to the determination of two arbitrators, one to be nominated by a majority of the parties hereto, one by the party charged, and a third, to act as umpire, by the two so chosen, as provided by an act entitled "An Act in relation to arbitration, constituting

^a Article 12 as modified by Conference Agreement No. 17-5 approved May 20, 1931.

chapter seventy-two of the Consolidated Laws", and being Chapter 275 of the Laws of 1920 of New York. The Chair-[fol. 18] man shall, when so directed by a vote of a majority of the parties hereto, in his name and on behalf of each and every of the parties hereto, other than the one charged with the breach file a complaint with the Arbitration Committee of the New York Produce Exchange, unless the parties shall have agreed to submit the controversy to arbitrators nominated as aforesaid, in which case the complaint shall be filed with the umpire, succinctly setting forth the facts of such breach, as charged, and thereupon and thereafter proceedings shall be had before said Arbitration Committee in accordance with the aforesaid statutes and the charter and bylaws of the New York Produce Exchange, or, as the case may be, before said nominated arbitrators in accordance with the laws of New York.

13. The parties hereto agree that said Arbitration Committee, or said nominated arbitrators, as the case may be, shall be, and they hereby are, authorized to determine whether this agreement has been breached by the party charged therewith, and to fix the amount of damages suffered by the other parties hereto at the amount to which they are liquidated as hereinbefore provided.

14. The parties hereto agree to accept and abide by the award of said Arbitration Committee of the New York Produce Exchange, or of the nominated arbitrators, if the arbitration is had before them, and further agreed that a judgment of the Supreme Court of the State of New York may be entered upon any award made pursuant to such submission before either the said Arbitration Committee, or said nominated arbitrators, as provided by the laws of New York.

15. The parties hereto agree that any judgment entered in conformity with any such award shall not be removed, reversed, modified or in any manner appealed from by the [fol. 19] parties hereto, except for fraud, collusion or corruption of said Arbitration Committee or of some member thereof, or of one or more of said nominated arbitrators.

16. Unless the party held guilty of a breach of this agreement, as aforesaid, shall pay the damages awarded by said Arbitration Committee of the New York Produce Exchange, or by said nominated arbitrators, as hereinbefore provided, within ten days after written notice of the character and

amount of the judgment entered on any award has been served by the Chairman upon the party in default, then execution may issue on such judgment against the goods of chattels of the judgment-debtor, in accordance with the laws of New York, and the rules and practices prevailing in the Supreme Court of the State of New York, for the enforcement of the judgments of said court; and levy of such execution may be made upon the \$25,000 which has been deposited by the party in default, as hereinbefore provided, with the Chairman.

17.¹ The Chairman or any other person designated by a majority of the parties hereto, shall be entitled to examine any of the books, records, accounts and documents of any party hereto charged with a breach of this agreement, by the filing of a complaint, as hereinbefore provided, for the purpose of adducing evidence in support of any such charge, and the refusal of the party charged with such breach to permit any such examination shall constitute a breach of this agreement, and shall be subject to the filing of a complaint and proceedings before the Arbitration Committee of the New York Produce Exchange, or other nominated arbitrators, and an award and judgment for damages, as herein-[fol. 20] before provided with respect to any other breach of this agreement.

18. The testimony of any party charged by the filing of a complaint with a breach of this agreement, or of any other party hereto, or of any other person, firm, or corporation, may be taken by deposition before trial in the arbitration proceedings, in the same manner and on the same grounds as provided by the laws of New York, for the taking of depositions before trial to be used in actions pending in any court of record of said state.

19. The expenses of the arbitration, including a reasonable allowance for attorneys' fees, shall be determined by the arbitrators and entered in the award, and shall become a part of the judgment thereon.

20. The expenses of maintaining and carrying on the Conference shall be paid prorata by all the parties hereto.

21.² Any party to this agreement may be eliminated herefrom by the agreement of a majority of the parties hereto,

¹ Article 17, as modified by Conference Agreement No. 17-5 approved May 20, 1931.

provided that reasonable cause therefor first shall have been shown. Violation of any of the rules or regulations agreed to by the parties hereto, or failure to permit the examination of the books, records, accounts and documents, or to submit to the taking of any deposition, as hereinbefore provided, or to participate in and abide by the results of any arbitration, shall constitute grounds for such elimination. In the event of such elimination, the \$25,000 deposited with the Chairman, or any balance thereof remaining on deposit, together with accrued interest thereon, shall be refunded to the eliminated party, providing that there is not pending against him any undetermined charge of a breach of this agreement which prima facie may result in a judgment for damages.

[fol. 21] 22.^a Any of the parties hereto may withdraw from this agreement by giving 60 days notice of intention to withdraw in writing to the Chairman. At the expiration of said period of 60 days the party thus giving said notice shall cease to be bound by this agreement, but shall, none the less, remain liable for any breach or violation of this agreement theretofore committed by him. It is therefore further provided that the \$25,000 deposited with the Chairman or any balance thereof remaining on deposit at the date when said notice is given shall remain on deposit for a period of 90 days after the giving of said notice and if at the expiration of said 90 days a complaint is pending against the company which gave such notice or if an award of the Arbitration Committee of the New York Produce Exchange or of the nominated arbitrators against such company remains unsatisfied by it, the \$25,000 or any balance thereof remaining on deposit with the Chairman shall be retained by the Chairman until such complaint is dismissed or the award is satisfied. At the expiration of said period of 90 days if no complaint be then pending against the company which gave such notice or if no award against such party remain unsatisfied or upon the dismissal of the complaint pending against the party or the satisfaction of an award made against him and remaining unsatisfied at the end of said 90 days, the said sum of \$25,000, deposited with the Chairman or any balance thereof remaining on deposit shall be re-

^a Articles 21 and 22 as modified by Conference Agreement No. 17-5 approved May 20, 1931.

funded to the withdrawing party. The parties mutually agree that any act or omission of a party hereunder which shall not be made the subject of a complaint against any party within 90 days after the giving of notice in writing as above provided shall not at any time thereafter be made the [fol. 22] basis of any arbitration action or proceeding; but on the other hand at the expiration of said 90 days any right or cause of action under this agreement based upon such act or omission shall be completely extinguished.

23. This agreement shall not be valid and binding upon the parties hereto unless and until it has been approved by the United States Shipping Board in accordance with the provisions of Section 15 of the Shipping Act, 1916, and all the parties hereto shall have made the deposit as hereinbefore provided.

24.^a Any person, firm or corporation may hereafter become a party to this agreement by the consent of a majority of the parties hereto, by affixing his signature hereto, and by depositing the sum of Twenty-five thousand (\$25,000) Dollars in United States Government bonds, or in cash, with the Chairman as provided by Article 10 hereof.

25. This agreement may be executed in several parts, and the said parts shall read and be effectual as one instrument.

In witness whereof the parties hereto have caused this agreement to be executed by their respective officers or agents thereunto duly authorized, the day and year herein first above written.

[fol. 23]

EXHIBIT B TO COMPLAINT

Far East Trade Agreement

Contract No.

Memorandum of Agreement, made the day of 19....., by and between hereinafter called the Shipper, and Members of Far East Conference, designated below and hereinafter called the

^a Article 24 as modified by Conference Agreement No. 17-5 approved May 20, 1931. Addenda pertaining to Freedom of Action in meeting non-conference competition approved as Conference Agreement No. 17-6 on October 1, 1931, cancelled by Order dated January 14, 1935.

Carriers, it being understood and agreed to by the Shipper and by the Carriers that if the Far East Conference add any additional line or lines to their membership, such line or lines shall thereby become party to this agreement, and the Shipper shall have the right to request shipping space of such line or lines as in this agreement provided; and should any line or lines cease to be members of said Conference, all future rights under this agreement of such line or lines, and of the Shipper as to any such line or lines, shall thereupon terminate.

1. The Shipper, in consideration of the rates and other conditions stated herein agrees to forward by vessels of the Carriers all shipments made, directly or indirectly, by him, his agents, subsidiary, associated and/or parent companies and shipped from United States ports, excepting, however, Pacific Coast ports, to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China, and Philippine Islands.

The commodities involved, the estimated quantities, and the rates and conditions to govern are shown on the attached supplement or supplements. It is mutually understood and agreed that if shipper should subsequently for, [fol. 24] ward any commodity other than those shown on attached supplement or supplements, said shipments are considered to be part of this agreement, and therefore entitled to the lowest rate then in effect on such commodity without requiring shipper to conclude a supplemental agreement with the Carriers.

2. The rates of freight named or provided for hereunder are subject to being increased reasonably from time to time by the Carriers giving the Shipper written notice thereof not less than thirty days in advance of the increase. Increases shall be deemed accepted by the Shipper unless he notifies the Carriers to the contrary within ten days from the receipt of said notice. Within said ten days, the Shipper may give the Carriers written notice of cancellation of this contract as of the effective date of the increased rate or rates, subject, nevertheless, to option on the part of the Carriers declarable not less than ten days prior to the effective date of the increased rate or rates, either to accept cancellation, or to continue this contract under the rates in effect when notice of increase be given.

Should the Carriers during the term of this agreement reduce rates on any of the commodities named, the Shipper shall be given the full benefit of such reduced rates during the period the same remain in effect.

3. The Shipper has the option of selecting any of the vessels operated by any of the respective carriers who, at time of shipment, are members of the Far East Conference, provided that required space to port of destination is available either direct or with transshipment when Shipper makes application therefor. Shipper is further required to reach agreement with respective carrier as to quantity per vessel, port or ports of loading, port or ports [fol. 25] of discharge, and to apply for said freight space as early as practicable before vessel's advertised sailing date. If the carriers fail to furnish space after the Shipper duly applies therefor, the Shipper shall be free with respect to such shipment to secure space elsewhere without prejudice to his right to future shipments under this agreement, provided that Shipper first notifies the office of the Far East Conference at New York and allows the Conference Secretary forty-eight hours from receipt of such notice to confirm that said space is not available.

4. If the Shipper shall make any shipments in violation hereof, this agreement shall immediately become null and void as to all future shipments, and thereupon the Shipper shall be liable to the transporting carriers for payment of additional freight on all commodities theretofore shipped with such carriers for a period not exceeding twelve months immediately preceding the date of such shipment, at the non-contract rate or rates on all commodities set forth in the current tariffs of the transporting carriers in force at the time of such shipments.

5. Shipments under this Agreement are subject to all the terms and conditions contained in the respective Carrier's engagement note, permit, dock receipt and/or regular form of bill of lading, in use by the Carrier when shipments are tendered.

6. In the event of any hostilities breaking out or threatening to break out, in which the United States and/or Great Britain and/or Japan and/or China and/or Indo-China and/or Russia and/or their Colonies are involved, or by which the Carrier's interests are affected, the Carriers have the option of cancelling this agreement.

[fol. 26] 7. In compliance with Section 16 of the "Ship-

ping 'Act, 1916,' payment by the Carriers and the acceptance of freight brokerage by the broker is with the strict understanding that no part of the brokerage thus collected shall revert to the Shipper or to the consignee, and that the business of the broker is in no sense subsidiary to or affiliated with that of the Shipper or of the consignee.

8. In the event of any disputes pertaining to, and arising during the existence of this contract, said disputes shall be referred to a board of three arbitrators, one of whom shall be appointed by each party to the contract and the two so nominated shall choose the third to act as umpire. The decision of any two of these as to the imposition of penalties and/or the enforcements of awards shall be final and binding upon both parties to this contract, and for the purpose of enforcing awards will be made a rule of the Court.

9. This Agreement, subject to the conditions set forth herein, may be terminated upon thirty (30) days written notice by the Shipper, or by all of the carriers or by any one or more of the Carriers (in which case such cancellation shall be effective only as to the notifying Carriers). If this Contract shall be terminated as to some, but not all, Carriers, the Shipper shall be at liberty to ship by such terminating Carriers so long as such terminating Carrier or Carriers remain members of the Far East Conference without thereby violating this Contract.

10. In the event of threat, existence or continuance of any present or future war or war-like conditions or hostilities or civil commotion, or measures taken by any Government in consequence thereof or in connection therewith, or the existence or continuance of conditions which, in the opinion of any one or more of the Carriers, indicates that there is a danger of any of the foregoing, which may impede, obstruct or delay, or render impossible or hazardous performance of its or their obligations due to the requisition, seizure or loss of any of the vessels of any one or more of the Carriers, or any other cause whatsoever whether similar or dissimilar, or which, in the sole judgment of any one or more of the Carriers, may directly or indirectly result in the imposition upon it or them of any undue financial or other hardship or burden in the performance of its or their obligations, any one or more of the Carriers shall have the option of forthwith cancelling this Agreement as to it or them. If this Agreement shall be

cancelled as to some but not all of the Carriers the Shipper shall be at liberty to ship by such cancelling Carrier or Carriers so long as such cancelling Carrier or Carriers remain members of the Far East Conference without thereby violating this Agreement:

List of Carriers:

.....	(Shipper)
By	Title
For and on Behalf of Mem-	(Address of
bers of Far East Conference:	Shipper)
By	
11 Broadway, New York 4,	
N. Y.	
(Address of Shipper Must	Subsidiary Associated
Be Shown on Contract)	And/Or Parent Com-
Revised Form. Aug. 15, 1945.	panies:

[fol. 28]

(ATTACHED SUPPLEMENT)

Far East Conference

Tariff Item No. 450.

Contract No.

Commodity: Cargo, not otherwise specified in Tariff.

Approximate quantity tons per year.

Effective Oct. 1, 1945.

RATES TO FAR EAST PORTS

Discharging Ports:

Yokohama, Kobe, Osaka, Hongkong, Manila	33.00
Shanghai	34.00
Cebu, Iloilo	37.80
Dairen (Dalny)	37.00

For rates to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China, and Philippine Islands, other than named above, apply to Conference Office.

All rates are to be prepaid in United States dollars per ton of 2,000 lbs, or 40 cu. ft., ship's option.

Individual packages over 35 ft. in length and/or over four (4) tons of 2,000 lbs. shall be assessed the additional tariff charge in effect at time of shipment.

Revised as of Oct. 1, 1945.

[fol. 29] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

ANSWER—Filed October 1, 1948

Far East Conference, United States Lines Company, States Marine Corporation, M. V. Nonsuco Inc., Lancashire Shipping Co., Ltd., Skibsaktieselskapet Igadi, A. F. Klavness & Co. A/S, The De La Rama Steamship Co., Inc., Waterman Steamship Corporation, Prince Line, Ltd., Lykes Bros. Steamship Co., Inc., American President Lines, Ltd., Swedish East Asiatic Co., Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., Aktieselskapet Ivarans Rederi, Ellerman & Bucknall Steamship Co., Ltd., Fearnley & Eger, Wilhelmsens Dampskibsaktieselskab, Dampskibsselskabet af 1912 A/S, The Bank Line, Ltd., The China Mutual Steam Navigation Co., Ltd., Silver Line, Ltd., The Ocean Steamship Company, Ltd., A/S Besco and A/S Dampskibsselskabet Svendborg, defendants above named, answering the complaint herein by Milton, McNulty & Augelli, their attorneys; allege:

First: Deny that the facts alleged in the complaint constitute a basis upon which the jurisdiction of this Court may be invoked under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", as amended, commonly known as the Sherman Anti-trust Act, or constitute violations by the defendants, jointly or severally, of Sections 1 and 2 of said Act; and except to the extent in this Paragraph First specifically denied, deny each and every allegation contained in the paragraph of the complaint numbered "1".

Second: Admit that the defendant, United States Lines Company, was organized and exists under the laws of the

State of New Jersey within the District of New Jersey, and has a place of business in said district and transacts business therein; and except as in this Paragraph Second specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "2".

Third: Admit that defendant, Far East Conference, has its office and principal place of business at 11 Broadway, New York, New York; and except as in this Paragraph Third specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "3".

Fourth: Admit that defendant, The Bank Line, Ltd., is a corporation organized and existing under the laws of Scotland and that it is represented by an agent who maintains an office for the transaction of business at 24 State Street, New York, New York; and except as in this Paragraph Fourth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "5".

Fifth: Admit that defendant, The China Mutual Steam Navigation Co. Ltd. is a corporation organized and existing under the laws of England and that it is represented by an agent who maintains an office for the transaction of business at 25 Broadway, New York, New York; and except as in this Paragraph Fifth specifically admitted, deny each and every allegation contained in the paragraph of the complaint numbered "6".

Sixth: Admit that defendants, Dampskibsselskabet af 1912 A/S and A/S Dampskibsselskabet Svendborg, are corporations organized and existing under the laws of Denmark and that they are represented by an agent who maintains an office for the transaction of business at 30 Broad Street, New York, New York; and except as in this [fol. 31] Paragraph Sixth specifically admitted, deny each and every allegation contained in the paragraphs of the complaint numbered "7" and "8".

Seventh: Admit that defendant, The De La Rama Steamship Co., Inc., is a corporation organized and existing under the laws of the Philippines and has an office at 90 Broad Street, New York, New York; and except as in this Paragraph Seventh specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "9".

Eighth: Admit that defendant, Ellerman & Bucknall Steamship Co. Ltd. is a corporation organized and existing under the laws of Great Britain and that it is represented by an agent who maintains an office for the transaction of business at 26 Beaver Street, New York, New York; and except as in this Paragraph Eighth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "10".

Ninth: Deny each and every allegation set forth and contained in the paragraph of the complaint numbered "11".

Tenth: Admit that defendant, A. F. Klaveness & Co. A/S, is a corporation organized and existing under the laws of Norway and that it is represented by an agent who has an office for the transaction of business at 310 Sansome Street, San Francisco, California; and except as in this Paragraph Tenth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "12".

Eleventh: Admit that defendants, Skipsaktieselskapet Igadi A/S Besco and Aktieselskapet Ivaråns Rederi, are corporations organized under the laws of Norway and that they are represented by an agent who maintains an office for the transaction of business at 17 Battery Place, New York, New York; and except as in this Paragraph Eleventh specifically admitted, deny each and every allegation set forth and contained in the paragraphs of the complaint numbered "14", "15" and "16".

Twelfth: Admit that defendant, Lancashire Shipping Co. Ltd., is a corporation organized and existing under the laws of the United Kingdom and that it is represented by an agent who maintains an office for the transaction of business at 52 Broadway, New York, New York; and except [fol. 32] as in this Paragraph Twelfth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "17".

Thirteenth: Admit that defendant, Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V. is a corporation organized and existing under the laws of Holland, and that defendant, The Ocean Steamship Company, Ltd., is a corporation organized and existing under the laws of Great Britain, and that both said corporations are represented by an agent who maintains an office for the transaction of business at 25 Broadway, New York; New York; and except as in this Paragraph Thirteenth specifically admitted, deny each and

and every allegation set forth and contained in the paragraphs of the complaint numbered "19" and "21".

Fourteenth: Admit that defendant, M. V. Nonsuco, Inc., is a corporation organized and existing under the laws of the Philippines and that it is represented by an agent who maintains an office for the transaction of business at 19 Rector Street, New York, New York; and except as in this Paragraph Fourteenth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "20".

Fifteenth: Admit that defendant, Prince Line, Ltd., is a corporation organized and existing under the laws of England and that it is represented by an agent who maintains an office for the transaction of business at 34 Whitehall Street, New York, New York; and except as in this Paragraph Fifteenth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "22".

Sixteenth: Admit that defendant, Silver Line, Ltd., is a corporation organized and existing under the laws of England and that it is represented by an agent who maintains an office for the transaction of business at 17 Battery Place, New York, New York; and except as in this Paragraph Sixteenth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "23".

Seventeenth: Admit that defendant, Swedish East Asiatic Co., Ltd. is a corporation organized and existing under the laws of Sweden and that it is represented by an agent who maintains an office for the transaction of business at 90 Broad Street, New York, New York; and except as in this [fol. 33] Paragraph Seventeenth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "25".

Eighteenth: Admit that defendant, Wilhelmsens Dampskibsselskab, is a corporation organized and existing under the laws of Norway and that it is represented by an agent who maintains an office for the transaction of business at 17 Battery Place, New York, New York; and except as in this Paragraph Eighteenth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "28".

Nineteenth: Admit that defendants, United States Lines Company, States Marine Corporation, Lancashire Shipping

Co. Ltd., Skibsaktieselskapet Igadi, The De La Rama Steamship Co., Inc., Waterman Steamship Corporation, Prince Line, Ltd., Lykes Bros. Steamship Co., Inc., American President Lines, Ltd., Swedish East Asiatic Co., Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., Aktieselskapet Ivarans Rederi, Isthmian Steamship Company, Ellerman & Bucknall Steamship Co., Ltd., Wilhelmsens Dampskibsaktieselskab, Dampskibsselskabet af 1912 A/S, The Bank Line, Ltd., The China Muthal Steam Navigation Co., Ltd., Silver Line, Ltd., The Ocean Steamship Company, Ltd., A/S Besco and A/S Dampskibsselskabet Svendborg, who are hereinafter for convenience collectively referred to as "The Member Lines," are engaged as common carriers by water in the transportation of property in foreign trades from Atlantic Coast and Gulf ports of the United States to ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China, and the Philippine Islands, which trades are referred to in the complaint herein and sometimes in this answer as the "outbound Far East trade"; that The Member Lines, together with persons who are not parties to this action, are presently parties to an agreement known as United States Maritime Commission Conference Agreement No. 17, approved November 14, 1922 under the provisions of Section 15 of the Shipping Act, 1916, as amended, which, as originally executed and from time to time amended and supplemented, will hereinafter for brevity be referred to as the "Far East Conference Agreement", and a substantially true copy of which, as amended to December 4, 1947, is attached to the complaint herein as Exhibit A; that the parties to the Far East Conference Agreement, as aforesaid, at the time of the commencement of this suit, included all but one of the common carriers engaged with reasonable regularity in the transportation [fol. 34] of property in the outbound Far East trade, and carry the major portion of all commercial cargoes transported in that trade; and except as in this Paragraph Nineteenth specifically admitted, deny each and every allegation set forth and contained in the paragraph of the complaint numbered "29". The defendants reserve the right to offer in evidence upon the trial of this suit a true and accurate copy of the Far East Conference Agreement and all amendments thereof.

Twentieth: Deny each and every allegation set forth

and contained in the paragraph of the complaint numbered "31".

Twenty-first: Admit that the parties to the Far East Conference Agreement, acting under and pursuant to that agreement, have included in their tariffs with respect to most commodities, both contract rates and non-contract rates; that contract rates are lower than non-contract rates; that the contract rates are available only to shippers who enter into an agreement with the parties to the Far East Conference Agreement which, as the same has been from time to time and will hereafter be amended, is hereinafter referred to as the Far East Freight Agreement; and that Exhibit B attached to the complaint, is a substantially accurate copy of the form of the Far East Freight Agreement, revised as of August 15, 1945; and except as in this Paragraph Twenty-first specifically admitted, deny each and every allegation set forth and contained in the paragraphs of the complaint numbered "32", "33", "34", "35" and "36". The defendants reserve the right to offer in evidence upon the trial of this action a true and accurate copy of the Far East Freight Agreement as the same has been from time to time amended.

As and for a First Separate and Complete Defense, the Defendants Answering Hereby Allege:

Twenty-second: Heretofore and on or about September 1, 1922, the defendants Prince Line, Ltd. and Ellerman & Bucknall Steamship Co., Ltd. together with the United States Shipping Board, Merchant Fleet Corporation, and approximately nine other common carriers by water in the outbound Far East trade, entered into the Far East Conference Agreement, and said Far East Conference Agreement was duly approved by the United States Shipping Board on November 14, 1922. Said parties entered into the Far East Conference Agreement at the instance and request of the plaintiff acting by and through the United States Shipping Board.

[fol. 35] Twenty-third: The Far East Conference Agreement was entered into for the purpose of securing, and the performance of the parties to the Far East Conference Agreement has, with the exception hereinafter stated, secured, to the shippers and carriers in the outbound Far East trade and to the commerce of the United States gen-

erally, as hereinafter more fully alleged, the advantages and benefits for the securing and protection of which the Shipping Act, 1916, and particularly Section 15 of said statute and its provisions for the approval of Conference agreements, were enacted.

Twenty-fourth: Since the date of the approval of the Far East Conference Agreement, all of the original parties thereto, excepting Prince Line, Ltd. and Ellerman & Bucknall Steamship Co., Ltd., have ceased to be parties to the Far East Conference Agreement; but there have been added to the parties to said agreement more than twenty new parties, certain of which consist of numerous ship-owning companies which are themselves organized as joint services pursuant to joint service agreements which have been filed with, and approved by, the United States Maritime Commission.

Twentieth-fifth: Certain of such new parties, notably those of Japanese nationality, have ceased to be parties to the Far East Conference Agreement. As of the date of the commencement of this suit, there were twenty parties to the Far East Conference Agreement, including, for the purpose of such enumeration, collectively as a single party, the various companies which entered into each joint service agreement.

Twenty-sixth: In the entire period during which the Far East Conference Agreement has been in effect, the parties thereto have never denied participation in the Far East Conference Agreement and membership in the Far East Conference, to any common carrier by water which has applied for such participation and membership; and all such applications were granted and the applicants became parties to the Far East Conference Agreement and members of the Far East Conference.

Twenty-seventh: The United States Maritime Commission, exercising its jurisdiction under and pursuant to the United States Shipping Act, 1916, the Merchant Marine Act, 1920, and the Merchant Marine Act, 1936, has adopted, and in its adjudicated reports has announced, a policy whereby its approval of any conference agreement under Section 15 of the Shipping Act, 1916, will be withdrawn in [fol. 36] the event that the parties thereto shall exclude from full and equal participation therein, any common carrier by water who can give reasonable evidence of ability

and intention in good faith to inaugurate and/or maintain a regular and dependable service in the trade which is within the scope of such conference agreement. Upon such disapproval of such conference agreement by the United States Maritime Commission, such agreement would become unlawful and it would be unlawful for the parties thereto to act further thereunder.

Twenty-eighth: The only common carrier by water operating with reasonable regularity in the outbound Far East trade and who is not, and who, at the date of the commencement of this suit, was not, a party to the Far East Conference Agreement and who, on information and belief, is the common carrier referred to in the paragraph of the complaint numbered "29", has made no application for participation in the Far East Conference Agreement and membership in the Conference. Said common carrier is hereinafter for convenience referred to as the "Second Outside Line". The Member Lines and the other parties to the Far East Conference Agreement are ready, able and willing to admit the Second Outside Line, upon its making application therefor, to full and equal participation in the Far East Conference Agreement and full and equal membership in the Far East Conference.

Twenty-ninth: Upon information and belief, since the date of the approval of the Far East Conference Agreement, no person, firm or corporation has been deterred, hindered, precluded or prevented from engaging in the transportation of cargoes in the outbound Far East trade, as common carrier or otherwise, by the defendants or by the parties from time to time participants in the Far East Conference Agreement or by any acts or practices done or engaged in by them collectively or severally.

Thirtieth: In accordance with the purposes contemplated by the enactment of the Shipping Act, 1916, the Far East Conference Agreement and the performance of the parties thereto thereunder and in accordance with its terms, has, excepting during the periods hereinafter specified, resulted in the achievement of numerous advantages and benefits to the merchants, manufacturers and farmers of the United States, whose products are sold in the territories served by the parties to the Far East Conference Agreement, and [fol. 37] great benefits and advantages to the agriculture,

commerce and industry of the United States generally, including the following:

(a) The substantial increase in sailing opportunities in the outbound Far East trade.

(b) Fixed and dependable dates of sailings at regular intervals.

(c) Stability of freight rates over long periods of time, with the result, among many others, that the American exporter has been able to quote prices and/or make contracts for future delivery in competition with foreign merchants, without fear of instability or of violent fluctuation in freight rates.

(d) Uniform freight rates have been made available to all merchants, manufacturers, farmers, or other exporters, irrespective of size or economic power.

(e) The elimination of weaker steamship lines has been prevented.

(f) Freight rates from the United States Atlantic and Gulf ports to the markets in the Far East have been maintained in proper relationship to the freight rates from foreign countries to those markets.

(g) The types of ships engaged in the outbound Far East trade have been immeasurably improved as respects speed, carrying capacity, refrigerated space, tank facilities and other characteristics.

The foregoing benefits and advantages have resulted in the general enhancement of the prosperity and security of the United States and of all of the elements of the economy thereof.

Thirty-first: Promptly upon the approval of the Far East Conference Agreement, the benefits and advantages described in Paragraph Thirtieth of this answer began to be operative and came to be progressively enjoyed by American exporting interests until in or about the year 1928. As an aid to the securing of such benefits and advantages by the elimination of uneconomic and destructive rate competition between the parties to the Far East Conference Agreement and the parties to an agreement known as the Pacific Westbound Conference Agreement, being U. S. Maritime Commission Agreement No. 57, the parties to the two said Conference agreements entered into a joint agree-

ment dated March 2, 1925, which was duly approved by the [fol. 38] United States Shipping Board and which provided that the parties to the two said Conference agreements might; as in said agreement stipulated, work cooperatively in the fixing of rates for the carriage of cargoes from Pacific Coast ports, on the one hand, and Atlantic Coast ports and Gulf of Mexico ports; on the other hand; to the various ports in the Far East. Said agreement of March 2, 1925 contained, among others, a provision to the effect that neither conference, party thereto, could reduce freight rates until thirty days after notice of such decrease should be given to the other conference.

Thirty-second: In or about the year 1928, a corporation, hereinafter referred to as the "First Outside Line," initiated a steamship service as a common carrier by water in the outbound Far East trade. Upon information and belief, the management of said First Outside Line was the predecessor in business of the Second Outside Line. The First Outside Line conducted its services by use of vessels owned by two ship-owning companies. Since the outbreak of the Second World War, said ship-owning companies discontinued furnishing vessels to the First Outside Line and established a joint service in the outbound Far East trade under their own management, and are now parties to the Far East Conference Agreement and are among the defendants named herein. Upon information and belief, the management of the said First Outside Line thereupon, through another corporate form, acquired vessels of its own and became and now is the Second Outside Line. Upon information and belief, the principal officers and those in executive charge of the business of the Second Outside Line and of the First Outside Line are identical and the policies and methods of business and competition are similar and have, with interruption only by the Second World War, been continuous.

Thirty-third: In or about the year 1928, the First Outside Line began and thereafter continued to engage in the practices, among others, (a) of quoting and charging freight rates fractionally under the rates fixed and established by the parties to the Far East Conference Agreement, and (b) offering to freight brokers exorbitant brokerages for diverting the cargoes of their principals to the First Outside Line. The practices of the First Outside Line resulted in a demoralization of the traffic in the outbound Far East

trade to such an extent that the exporters from the United States in said trade were unable to know from day to day what freights they would be required to pay for the transportation of their cargoes in the outbound Far East trade. The parties for the time being to the Far East Conference [fol. 39] Agreement, as a means of eliminating said demoralization, invited and urged the First Outside Line to become a party to the Far East Conference Agreement; but the First Outside Line refused so to do unless, as a condition of its so doing, the Conference would agree that the First Outside Line might treat certain of its shippers preferentially. The parties for the time being to the Far East Conference Agreement refused to concede these illegal conditions.

Thirty-fourth: (a) That in or about the year 1929, in order to attempt a stabilization of the commerce between all United States ports and ports in the Far East, the parties for the time being to the Far East Conference Agreement and the parties to the Pacific Westbound Conference Agreement, acting under said joint agreement dated March 2, 1925, and not otherwise, established with respect to certain commodities two levels of rates, the lower of which was made available to all shippers who entered into an agreement with the parties to the said two Conference agreements, to ship their commodities by vessels of said parties. Similar agreements were entered into in the year 1930, with respect to a somewhat larger group of commodities.

(b) The establishment of said rates and the entry into said agreements proved incapable of eliminating said demoralization; and, in the premises, the parties for the time being to the Far East Conference Agreement determined that the competitive methods pursued by the First Outside Line required that said parties should be able to reduce the rates within the scope of their conference agreement more speedily than was possible, because of said provision for thirty days' notice, so long as said agreement dated March 2, 1925 continued in effect. Accordingly, in September 1930, the parties for the time being to the Far East Conference Agreement took measures to terminate said agreement dated March 2, 1925, and said agreement was thereupon so terminated.

(c) In or about February 1931, the said competition became so disruptive that nine of the eleven members of the Far East Conference gave notice under the Far East Con-

ference Agreement of their withdrawal therefrom, to take effect on May 6, 1931, and said Far East Conference was threatened with extinction. Prior to the latter date, however, five of the nine members who had given such notice retracted the notices so given by them and in the following September, three of the remaining four members rejoined the Conference in an effort to restore stability.

[fol 40] Thirty-fifth: Thereupon and in the years 1931, 1932, 1933 and 1934, the parties for the time being to the Far East Conference Agreement, acting pursuant to the Far East Conference Agreement and not otherwise, but without cooperation with the parties to any other conference agreement, established two levels of rates, known as contract and non-contract rates, with respect to certain commodities and made the lower or contract rates available to all shippers of such commodities who would enter into the forms of agreement adopted in said respective years, providing in substance that the shippers of such commodities would ship the same to ports in the Far East exclusively by the vessels owned and/or operated by the parties to the Far East Conference Agreement.

Thirty-sixth: Notwithstanding the measures taken as aforesaid, the conditions prevailing in the commerce in the outbound Far East trade had, due to the competitive methods of the First Outside Line, deteriorated to such an extent by March 1934, that the Department of Commerce, Shipping Board Bureau, which then exercised the jurisdiction now vested in the United States Maritime Commission, on its own motion, instituted an investigation pursuant to the provisions of Section 19 of the Merchant Marine Act, 1920, to determine what rules and regulations it might promulgate to correct or to alleviate the disruptive conditions brought about as aforesaid. As the result of the said investigation, the said Shipping Board Bureau promulgated its report in a proceeding known as "Docket 128—Investigation—Section 19 of the Merchant Marine Act, 1920", which is reported at 1 U. S. Maritime Commission 470. In said report, the said Shipping Board Bureau fully described and thereupon condemned the said disruptive competitive methods of the First Outside Line and the effects thereof on the commerce of the United States. The defendants respectfully ask leave to, and do hereby, incorporate herein by reference the aforesaid report of the said Shipping Board Bureau.

Thirty-seventh: As the result of said investigation, the said Shipping Board Bureau determined that its powers in the premises were limited to the issuance of an order, which it thereupon issued, requiring common carriers in outbound trades from United States ports, to file with it, within thirty days after adoption, copies of their tariffs and modifications thereof.

Thirty-eighth: Inasmuch as such filing was not required to be made until thirty days after the adoption of the respective rates, the said order resulting from said investigation, although affording some relief, was not "adequate [fol. 41] to remedy the conditions which afflicted the commerce of the United States as aforesaid.

Thirty-ninth: Under the circumstances aforesaid, and acting pursuant to the Far East Conference Agreement and not otherwise, (a) the parties to the Far East Conference Agreement, in the years 1935 and 1936, continued the establishment of tariffs with respect to an increasing number of the commodities moving in the Far East trade at two levels of rates—contract rates and non-contract rates—of which the contract rates were lower, and made said contract rates available to all shippers of the commodities with respect to which contract rates were established, who should enter into an agreement with the parties for the time being to the Far East Conference Agreement, to the effect that such contracting shippers would ship all of their said commodities destined for ports in the Far East by vessels owned and/or operated by the parties for the time being to the Far East Conference Agreement; (b) in or about the year 1937, changed the form of said contract with said shippers so that the same became in substance the Far East Freight Agreement which, with various changes and amendments, resulted in the form attached to the complaint and marked Exhibit B; and (c) in or about the month of March, 1936, and continuously thereafter, made note of the application of the said contract and non-contract rates in their Conference tariffs and duly filed successively with the United States Shipping Board Bureau of the Department of Commerce and with the United States Maritime Commission, said tariffs, said successive forms of the Far East Freight Agreement, and minutes of all Conference meetings at which such tariffs and/or agreement forms were adopted or amended. The form of Far

East Freight Agreement which was in effect prior to the outbreak of the Second World War, provided that the rates of freight could be increased only after ninety days' notice to the shipper, and that the agreement could be cancelled only on ninety-days' notice. In September 1939, at the outbreak of said War, and due to the conditions incident to the War and the measures taken by the various governments in connection therewith, the said ninety day periods were respectively shortened to thirty days. The present parties to the Far East Conference Agreement have duly taken action to amend the outstanding Far East Freight Agreements, effective December 1, 1948, and to change the form thereof with respect to shippers who shall enter thereinto subsequent to December 1, 1948, so that the same shall be in accordance with the form hereto attached, marked Exhibit 1, and made a part of this answer.

[fol. 42] Fortieth: The parties to the Far East Conference Agreement enter into Far East Freight Agreements with, and make contract rates available to, all shippers in the outbound Far East trade who desire to enter into such agreements without preference or discrimination; and at all of the times mentioned in the paragraphs hereof numbered Thirty-fourth (a), Thirty-fifth and Thirty-ninth, have entered into the agreements therein referred to with, and made the contract rates available to, all shippers in the outbound Far East trade without preference or discrimination.

Forty-first: Notwithstanding the beneficial effects of the order entered by the United States Shipping Board Bureau of the Department of Commerce in Docket 128, as aforesaid, and notwithstanding the action taken by the parties from time to time to the Far East Conference Agreement, as aforesaid, with respect to the establishment of contract and non-contract rates, conditions of stability had not returned in the Far East trade at the time of the outbreak of said War in 1939. As shippers and exporters generally came to appreciate the disruptive effect upon their affairs of the continuance of the conditions aforesaid, they, in increasing numbers, became parties to Far East Freight Agreements, with the result that, since the cessation of hostilities, the major portion of the export commerce of the United States in the outbound Far East trade, is transported under and pursuant to Far East Freight Agreements.

Forty-second: As a result of the adoption of the Far East Freight Agreement and the application thereunder of said contract rates, the Far East Conference has, since the termination of hostilities, again been able to establish conditions substantially as they existed prior to 1928 in the outbound Far East trade, and to extend to the merchants, farmers and manufacturers of the United States the advantages arising from conference action, including those enumerated in the paragraph hereof numbered Thirtieth.

Forty-third: The United States Maritime Commission and its predecessors in authority have repeatedly upheld the establishment of contract and non-contract rates and the use in connection therewith of agreements of the character represented by Exhibit B annexed to the complaint, and more particularly of a character represented by Exhibit 1 hereto attached as constituting a proper practice by conferences acting pursuant to agreements approved under Section 15 of the Shipping Act, 1916, so long as said respective conferences should permit full and equal participation therein by all common carriers in the respective trades who [fol. 43] should give evidence of ability and intention in good faith to establish and/or maintain a regular and dependable service in the respective trades. Such rulings on the part of the said Maritime Commission and its said predecessors are to be found, among others, in the following of their official reports:

Docket No. 80—*The W. T. Rawleigh Co. v. M. V. Stoomvaart Mij "Nederland", et al.*, 4 U. S. S. B. 285 (1933);

Docket No. 648—*Pacific Coast/European Conference Agreement*, 3 U. S. M. C. 11 (1948);

Docket No. 423—*Phelps Bros. & Co., Inc. v. Cosulich-Societa, etc.*, 1 U. S. M. C. 634 (1937);

Docket No. 515—*Sprague Steamship Agency, Inc. v. A/S Ivarans Rederi, et al.*, 2 U. S. M. C. 72 (1939).

Forty-fourth: Pursuant to said rulings of the United States Maritime Commission, conferences in many of the most important trades have adopted such rates and similar contracts; and the welfare and stability of an important part of the commerce of the United States is dependent upon the continuance thereof.

Forty-fifth: It would be economically impossible for the

defendants to continue to afford to the merchants, farmers and manufacturers who ship their merchandise in the outbound Far East trade, the advantages of conference operation, including those enumerated in Paragraph Thirtieth, without tariffs of the type adopted by the Far East Conference as aforesaid and without said Far East Freight Agreement. The defendants have invested, and if their frequent service with speedy and especially adapted vessels is to be maintained, must continue to invest large sums of money in the construction of progressively more modern vessels. Such investment would be discouraged or halted unless the steamship owners are assured of the regular patronage of a considerable body of shippers at compensatory rates of freight. Although the shippers in every industry benefit when all of them are charged fair and reasonable rates of freight with stability maintained over long periods of time, nonetheless, the individual shipper, when offered an opportunity to ship at fractionally lower rates, tends to seek this advantage over his competitors, and these competitors are thereby of necessity compelled, likewise, to seek similarly lowered shipping charges. As a consequence, unless such contract and non-contract tariffs are maintained, disruptive conditions such as those described in said Docket [fol. 44] 128—Investigation—Section 19 Merchant Marine Act, 1920 will prevail, with the result that (a) the weaker steamship lines who are unable to endure cutthroat competition will be eliminated, and (b) the remaining conference members, faced by a reduction of their revenues to the point where they cease to provide compensation for the regular and speedy services which had theretofore been maintained, will be forced to choose between abandoning their services in the trade altogether and conducting them with little or no regularity and with inferior tonnage, so that the service rendered will be commensurate with the compensation received.

Forty-sixth: The exporters of agricultural and industrial products from British and European ports to the Far East market enjoy all of the benefits arising from ocean freight rates fixed by conference action, including those enumerated in Paragraph Thirtieth, for the reason, among others, that the laws of Great Britain and of the continental European countries permit the conferences to avail themselves not alone of the practice of adopting contract and non-contract rates, the former of which are available to shippers

who enter into contracts of a purport generally similar to Exhibit B annexed to the complaint, but also permit the parties to conference agreements to adopt other methods of avoiding destructive and disruptive competition which have been rendered illegal by the Shipping Act, 1916, as amended. Unless the defendants are permitted to continue the practice of adopting contract and non-contract rates, accompanied by agreements such as Exhibit B annexed to the complaint or Exhibit 1 hereto annexed, the shippers of the products of American factories and farms, being deprived of said advantages, will be unable to compete with the exporters of such products from Great Britain and Europe and will be unable to compete fairly among themselves because of the inevitable discrimination and fluctuations in freight rates which would result.

Forty-seventh: At all times since the establishment of the tariffs of rates as aforesaid and the adoption of said Far East Freight Agreement, the rates of freight from time to time established by the parties to the Far East Conference Agreement have been fair and reasonable and have been applied without preference or discrimination.

Forty-eighth: By reason of the premises, (a) to the extent, if any, that the acts of the defendants alleged in the complaint have effected any restraint of the foreign trade and commerce of the United States, said restraint has [fol. 45] been fair and reasonable and necessary in the interests of American industry, commerce and agriculture and of the common carriers in the outward Far East trade; and (b) all of the acts of the defendants alleged in the complaint have been done and performed under and pursuant to an agreement duly filed and duly approved in accordance with the provisions of Section 15 of the Shipping Act, 1916, as amended, and are accordingly excepted from the provisions of Sections 1 and 2 of the Act of July 2, 1890, as amended, known as the Sherman Antitrust Act.

As a second separate and complete defense, the defendants answering hereby allege:

Forty-ninth: Heretofore and prior to January 12, 1948, a number of common carriers by water in the trade between United States Pacific Coast ports and European ports, filed with the United States Maritime Commission for approval pursuant to the provisions of Section 15 of the Shipping Act, 1916, as amended, an agreement known as

the Pacific Coast/European Conference Agreement, being Agreement Nos. 5200 and 5200-2.

Fiftieth: The United States Maritime Commission duly instituted an investigation upon its own motion to determine whether the said agreements should be approved or disapproved.

Fifty-first: Upon information and belief, the Antitrust Division of the United States Department of Justice intervened in said proceeding and challenged the legality of the practice of the Pacific Coast/European Conference in charging for transportation at two levels of rates and of obtaining from their shippers contracts of the general character of that represented by Exhibit B attached to the complaint, on the ground that these practices are monopolistic, result in different rates for identical services, and because the contract with the shipper is not subject to approval under Section 15 of the Shipping Act, 1916, and therefore is not subject to exemption from the Antitrust Act and for other reasons.

Fifty-second: Upon information and belief, the United States Maritime Commission, subject to an amendment of the form of freight contract to be tendered to shippers, overruled the objection of the Antitrust Division of the Department of Justice on the ground that the members of the Conference had at no time denied membership to any [fol. 46] applicant carrier, and that the contract rate system is a necessary practice in the trade to secure the continuance of the Conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates.

Fifty-third: Upon information and belief, said Antitrust Division of the United States Department of Justice has taken no action to obtain judicial review of the aforesaid determination of the United States Maritime Commission.

As a third separate and complete defense, the defendants answering hereby allege:

Fifty-fourth: The complaint fails to state a claim against the defendants upon which relief can be granted.

As a fourth separate and complete defense, the defendants answering hereby allege:

Fifty-fifth: This Court lacks jurisdiction over the subject matter of this action (a) because agreements between

common carriers by water in foreign commerce in respect of competition and cooperative arrangements and the fixing of rates and the establishment of tariffs and of the rules and regulations relative to the application thereof, are within the exclusive jurisdiction of the United States Maritime Commission under the Shipping Act, 1916, as amended, (b) because the alleged acts of the defendants as set forth in the complaint are claimed to have occurred in respect of matters subject to the exclusive jurisdiction, supervision and regulation of the United States Maritime Commission which is authorized by law to afford a complete remedy by means of investigation, decision and appropriate order, (c) because the plaintiff has no right to apply to this Court for injunctive relief in advance of investigation, decision and order by the United States Maritime Commission with respect to the matters alleged in the complaint, or in advance of any violation by the defendants of such order as the United States Maritime Commission might make pursuant to such investigation, and (d) because a judicial remedy does not lie in such case until the administrative remedy before the United States Maritime Commission shall have been finally and completely exhausted.

[fol. 47] As a fifth separate and complete defense, defendants answering hereby allege:

Fifty-sixth: The plaintiff has a full, adequate and complete remedy at law before the United States Maritime Commission.

WHEREFORE, the defendants pray judgment that the complaint herein be dismissed.

Dated: Jersey City, N. J., October 1, 1948.

Milton, McNulty & Angelli, by John Milton, Member of the Firm; Solicitors for Defendants, Far East Conference, United States Lines Company, States Marine Corporation, M. V. Nonsuco Inc., Lancashire Shipping Co., Ltd., Skibsaktieselskapet Igadi, A. F. Klaveness & Co. A/S, The De La Rama Steamship Co., Inc., Waterman Steamship Corporation, Prince Line, Ltd., Lykes Bros. Steamship Co., Inc., American President Lines, Ltd., Swedish East Asiatic Co., Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., Aktieselskapet

Ivarans Rederi, Ellerman & Bucknall Steamship Co., Ltd., Fearnley & Eger, Wilhelmsens Dampskibsaktieselskab, Dampskibsselskabet af 1912 A/S, The Bank Line, Ltd., The China Mutual Steam Navigation Co., Ltd., Silver Line, Ltd., The Ocean Steamship Company, Ltd., A/S Besco and A/S Dampskibsselskabet Svendborg, Office & P. O. Address, 1 Exchange Place, Jersey City, N.-J.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 48]

EXHIBIT 1 TO ANSWER

Far East Freight Agreement.

Contract No.

Memorandum of Agreement, made the day of , 19 .. , by and between hereinafter called the Shipper, and Members of Far East Conference, designated below and hereinafter called the Carriers, it being understood and agreed to by the Shipper and by the Carriers that if the Far East Conference add any additional line or lines to their membership, such line or lines shall thereby become party to this Agreement, and the Shipper shall have the right to request shipping space of such line or lines as in this Agreement provided; and should any line or lines cease to be members of said Conference all future rights under this Agreement of such line or lines, and of the Shipper as to any such line or lines, shall thereupon terminate.

1. The Shipper, in consideration of the rates and other conditions stated herein agrees to forward by vessels of the Carriers all shipments made, directly or indirectly, by him, his agents, subsidiary, associated and/or parent companies and shipped from United States ports, excepting, however, Pacific Coast ports, to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and Philippine Islands.

The commodities involved, the estimated quantities, and the rates and conditions to govern are shown on the attached supplement or supplements. It is mutually understood and agreed that if Shipper should subsequently forward any commodity other than those shown on attached supplement or supplements, said shipments are considered

to be part of this Agreement, and therefore entitled to the lowest rate then in effect on such commodity without requiring Shipper to conclude a supplemental agreement with the Carriers.

2. The rates of freight named or provided for hereunder are subject to being increased reasonably from time to time by the Carriers giving the Shipper written notice thereof not less than ninety (90) days in advance of the increase. Increases shall be deemed accepted by the Shipper unless he notifies the Carriers to the contrary within thirty (30) days from the receipt of said notice. Within said thirty days, the Shipper may give the Carriers written notice of cancellation of this contract as of the effective date of the increased rate or rates, subject, nevertheless, to the option on the part of the Carriers, declarable not less than thirty (30) days prior to the effective date of the increase in rate [fol. 49] or rates, either to accept the cancellation, or to continue this contract in force under the rates in effect at the date when the notice of increase shall have been given. Recognizing that it will be impracticable for the Carriers to give notices of increases of all rates to all contracting shippers, it is agreed that the Carriers shall furnish to the Shipper notices of all increases in rates applicable only to the commodity or commodities specified in the attached supplement or supplements and such additional commodity or commodities as to which the Shipper shall have given written notice to the Chairman of the Far East Conference of his intention to ship.

Should the Carriers, during the term of this Agreement reduce rates on any commodities which are covered by the attached supplement or supplements, or which are mentioned in any notice given by the Shipper to the Carriers as aforesaid, the Shipper shall be given the full benefit of such reduced rates during the period the same remain in effect; provided, however, that nothing herein contained is intended to preclude the Carriers from furnishing transportation for goods not intended for commercial or industrial use, shipped by governments, governmental agencies or public or private, national or international, charitable, eleemosynary or humanitarian agencies, or religious or missionary societies, at rates lower than the rates herein provided for; and if the Carriers do so carry at such lower rates, the Shipper shall have no right hereunder to require

the Carriers to transport for the Shipper at such lower rates.

3. The Carriers undertake, throughout the period of this Agreement, to maintain a steamship service which shall, so far as concerns the frequency of sailings and the carrying capacity of their vessels, be adequate to meet all of the reasonable requirements of the commerce of the United States moving in the trades specified in Paragraph 1 hereof; and the Carriers further agree that, subject to the availability of unbooked space in the vessels of the Carriers at the time when the Shipper applies therefor, the vessels of the Carriers shall, subject to the provisions of Paragraph 5 hereof, transport the cargoes of the Shipper in the aforesaid trade, upon the terms and conditions herein set forth.

The Shipper shall have the option of selecting any of the vessels operated by any of the respective Carriers who at time of shipment are Members of the Far East Conference, provided that the required space to port of destination is available in the vessels selected either direct or with transshipment at the time when the Shipper makes application therefor. The Shipper shall be required to reach agreement [fol. 50] with the respective Carriers as to the quantity to be shipped per vessel, port or ports of loading, port or ports of discharge, and to apply for freight space as long prior to the vessel's advertised sailing date is practicable. If the Carriers do not furnish space after the Shipper duly applies therefor, the Shipper shall be free, with respect to such shipment, to secure space elsewhere without prejudice to his right to future shipments under this Agreement, provided that the Shipper first notifies the Chairman of the Far East Conference at New York and allows the Chairman forty-eight (48) hours from the receipt of such notice to confirm that such space is not available.

4. If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impracticable to determine. Such liquidated damages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate or rates currently in effect. Failure of the Shipper to pay liquidated damages within thirty (30) days after the receipt

of notice from the Conference that such liquidated damages are due and payable shall be cause for the Conference to terminate the Shipper's right to the contract rates until the Shipper pays to the Conference the amount due. In the event the Shipper violates this contract more than once in any period of twelve months, the Conference may cancel this contract by serving written notice of such cancellation upon the Shipper and notifying the Maritime Commission of such action. If the Contract is cancelled for violation thereof as provided herein, the Conference may refuse to enter into a new contract with the Shipper until any unpaid liquidated damages due to the Conference have been paid in full.

In order that the Conference may determine the existence or non-existence of a violation hereof, the Shipper shall, upon request, furnish to the Conference full and complete information with respect to any shipment or shipments made by such Shipper in the trade covered by this Agreement.

5. Shipments under this Agreement are subject to all the terms and conditions contained in the respective Carrier's engagement note, permit, dock receipt and/or regular form of bill of lading, in use by the Carrier when shipments are tendered.

6. In the event of any hostilities breaking out or threatening to break out, in which the United States and/or Great Britain and/or Japan and/or China and/or Indo-China and/or Russia and/or their Colonies are involved, or by [fol. 51] which the Carriers' interests are affected, the Carriers have the option of cancelling this Agreement.

7. In compliance with Section 16 of the "Shipping Act, 1916," payment by the Carriers and the acceptance of freight brokerage by the broker is with the strict understanding that no part of the brokerage thus collected shall revert to the Shipper, or to the consignee, and that the business of the broker is in no sense subsidiary to or affiliated with that of the Shipper or of the Consignee.

8. Any disputes between the parties hereto arising out of this Agreement or involving the interpretation or effect thereof, shall be referred to a board of three arbitrators, one of whom shall be appointed by the Shipper, the second of whom shall be appointed by the Carriers, and the third of whom shall be appointed by the two arbitrators ap-

pointed as aforesaid. The decision of any two of said arbitrators with respect to any matter submitted to them as aforesaid, including, but without limitation, the amount of damages arising from any breach of this Agreement, shall be final and binding upon the Shipper and the Carriers and, for the purpose of enforcing any such award, the same shall be made a rule of the Court.

9. This Agreement, subject to the conditions set forth herein, may be terminated upon ninety (90) days written notice by the Shipper, or by all of the Carriers, or by any one or more of the Carriers (in which case such cancellation shall be effective only as to the notifying Carriers). If this Contract shall be terminated as to some, but not all, Carriers, the Shipper shall be at liberty to ship by such terminating Carriers so long as such terminating Carrier or Carriers remain members of the Far East Conference without thereby violating this Contract.

10. In the event of threat, existence or continuance of any present or future war or war-like conditions or hostilities or civil commotion, or measures taken by any Government in consequence thereof or in connection therewith, or the existence or continuance of conditions which, in the opinion of any one or more of the Carriers, indicates that there is a danger of any of the foregoing, which may impede, obstruct or delay, or render impossible or hazardous performance of its or their obligations due to the requisition, seizure or loss of any of the vessels of any one or more of the Carriers, or any other cause whatsoever whether similar or dissimilar, or which, in the sole judgment of any one or more of the Carriers, may directly or indirectly result in the imposition upon it or them of any undue financial or other hardship or burden in the performance of its or their [fol. 52] obligations, any one or more of the Carriers shall have the option of forthwith cancelling this Agreement as to it or them. If this Agreement shall be cancelled as to some but not all of the Carriers the Shipper shall be at liberty to ship by such cancelling Carrier or Carriers so long as such cancelling Carrier or Carriers remain members of the Far East Conference without thereby violating this Agreement.

11. It is agreed that the party herein referred to as the Shipper is not the agent or broker for any principal,

whether disclosed or undisclosed, and that no party who is not named herein or at the foot hereof shall have any rights as Shipper by virtue hereof.

List of Carriers:

(Shipper)

By

Title

(Address of Shipper)

Subsidiary, Associated and/or
Parent Companies:

For and on Behalf of Members of
Far East Conference:

By

Chairman

11 Broadway, New York 4, N. Y.

(Address of Shipper must be Shown on Contract)

[fol. 53] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

ANSWER—Filed October 4, 1948

Defendant Isthmian Steamship Company, a corporation organized and existing under the laws of the State of Delaware, answering the complaint herein, alleges:

First: Denies that the facts alleged in the complaint constitute a basis upon which the jurisdiction of this Court may be invoked under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", as amended, commonly known as the Sherman Antitrust Act, or constitute violations by the defendants, jointly or severally, of Sections 1 and 2 of said Act; and except to the extent in this Paragraph First specifically denied, denies each and every allegation contained in the paragraph of the complaint numbered "1".

Second: Admits that the defendant, United States Lines Company, was organized and exists under the laws of the [fol. 54] State of New Jersey, within the District of New Jersey, and has a place of business in said district and transacts business therein; and except as in this Paragraph Second specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "2".

Third: Admits that defendant, Far East Conference, has its office and principal place of business at 11 Broadway, New York, New York; and except as in this Paragraph Third specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "3".

Fourth: Admits that defendant, The Bank Line, Ltd., is a corporation organized and existing under the laws of Scotland and that it is represented by an agent who maintains an office for the transaction of business at 24 State Street, New York, New York; and except as in this Paragraph Fourth specifically admitted, denies each and every allega-

tion set forth and contained in the paragraph of the complaint numbered "5".

Fifth: Admits that defendant, The China Mutual Steam Navigation Co. Ltd. is a corporation organized and existing under the laws of England and that it is represented by an agent who maintains an office for the transaction of business at 25 Broadway, New York, New York; and except as in this Paragraph Fifth specifically admitted, denies each and every allegation contained in the paragraph of the complaint numbered "6".

[fol. 55] Sixth: Admits that defendants, Dampskibsselskabet af 1912 A/S and A/S Dampskibsselskabet Svendborg, are corporations organized and existing under the laws of Denmark and that they are represented by an agent who maintains an office for the transaction of business at 30 Broad Street, New York, New York; and except as in this Paragraph Sixth specifically admitted, denies each and every allegation contained in the paragraphs of the complaint numbered "7" and "8".

Seventh: Admits that defendant, The De La Rama Steamship Co., Inc., is a corporation organized and existing under the laws of the Philippines and has an office at 90 Broad Street, New York; and except as in this Paragraph Seventh specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "9".

Eighth: Admits that defendant, Ellermann & Bucknall Steamship Co., Ltd. is a corporation organized and existing under the laws of Great Britain and that it is represented by an agent who maintains an office for the transaction of business at 26 Beaver Street, New York, New York; and except as in this Paragraph Eighth specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "10".

Ninth: Denies each and every allegation set forth and contained in the paragraph of the complaint numbered "11".

Tenth: Admits that defendant, A. F. Klaveness & Co. A/S, is a corporation organized and existing under the laws [fol. 56] of Norway and that it is represented by an agent who has an office for the transaction of business at 310 Sansome Street, San Francisco, California; and except as in this Paragraph Tenth specifically admitted, denies each and

every allegation set forth and contained in the paragraph of the complaint numbered "12".

Eleventh: Admits that it is a corporation organized and existing under the laws of the State of Delaware and maintains an office for the transaction of business at 71 Broadway, New York, New York. Except as above admitted, it denies Paragraph "13".

Twelfth: Admits that defendants, Skibsaktieselskabet, Igadi, A/S Besco and Aktieselskapet Ivarans Rederi, are corporations organized under the laws of Norway and that they are represented by an agent who maintains an office for the transaction of business at 17 Battery Place, New York, New York; and except as in this Paragraph Twelfth specifically admitted, denies each and every allegation set forth and contained in the paragraphs of the complaint numbered "14", "15" and "16".

Thirteenth: Admits that defendant, Lancashire Shipping Co. Ltd., is a corporation organized and existing under the laws of the United Kingdom and that it is represented by an agent who maintains an office for the transaction of business at 52 Broadway, New York, New York; and except as in this Paragraph Thirteenth specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "17".

[fol. 57] Fourteenth: Admits that defendant, Nederlandsche Stoomvaart Maatschappij "Oceaan" N.V. is a corporation organized and existing under the laws of Holland, and that defendant, the Ocean Steamship Company, Ltd., is a corporation organized and existing under the laws of Great Britain, and that both said corporations are represented by an agent who maintains an office for the transaction of business at 25 Broadway, New York, New York; and except as in this Paragraph Fourteenth specifically admitted, denies each and every allegation set forth and contained in the paragraphs of the complaint numbered "19" and "21".

Fifteenth: Admits that defendant, M. V. Nonsuco, Inc., is a corporation organized and existing under the laws of the Philippines and that it is represented by an agent who maintains an office for the transaction of business at 19 Rector Street, New York, New York; and except as in this Paragraph Fifteenth specifically admitted, denies each and

every allegation set forth and contained in the paragraph of the complaint numbered "20".

Sixteenth: Admits that defendant, Prince Line, Ltd., is a corporation organized and existing under the laws of England and that it is represented by an agent who maintains an office for the transaction of business at 34 Whitehall Street, New York, New York; and except as in this Paragraph Sixteenth specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "22".

[fol. 58] Seventeenth: Admits that defendant, Silver Line, Ltd., is a corporation organized and existing under the laws of England and that it is represented by an agent who maintains an office for the transaction of business at 17 Battery Place, New York, New York; and except as in this Paragraph Seventeenth specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "23".

Eighteenth: Admits that defendant, Swedish East Asiatic Co., Ltd. is a corporation organized and existing under the laws of Sweden and that it is represented by an agent who maintains an office for the transaction of business at 90 Broad Street, New York, New York; and except as in this Paragraph Eighteenth specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "25".

Nineteenth: Admits that defendant, Wilhelmsens Dampskibsselskab, is a corporation organized and existing under the laws of Norway, and that it is represented by an agent who maintains an office for the transaction of business at 17 Battery Place, New York, New York; and except as in this Paragraph Nineteenth specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "28".

Twentieth: Admits that defendants, United States Lines Company, States Marine Corporation, Lancashire Shipping Co. Ltd., Skibsaktieselskapet Igadi, The De La Rama Steamship Co., Inc., Waterman Steamship Corporation, [fol. 59] Prince Line, Ltd., Lykes Bros. Steamship Co., Inc., American President Lines, Ltd., Swedish East Asiatic Co.,

Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., Aktieselskabet Ivarans Rederi, Isthmian Steamship Company, Ellerman & Bucknall Steamship Co., Ltd., Wilhelmsens Dampskibsaktieselskab, Dampskibsselskabet Af 1912 A/S, The Bank Line, Ltd., The China Mutual Steam Navigation Co. Ltd., Silver Line, Ltd., The Ocean Steamship Company, Ltd., A/S Besco and A/S Dampskibsselskabet Svendborg, who are hereinafter for convenience collectively referred to as "The Member Lines", are engaged as common carriers by water in the transportation of property in foreign trades from Atlantic Coast and Gulf ports of the United States to ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China, and the Philippine Islands, which trades are referred to in the complaint herein and sometimes in this answer as the "outbound Far East trade"; that The Member Lines, together with persons who are not parties to this action, are presently parties to an agreement known as United States Maritime Commission Conference Agreement No. 17, approved November 14, 1922 under the provisions of Section 15 of the Shipping Act, 1916, as amended, which, as originally executed and from time to time amended and supplemented, will hereinafter for brevity be referred to as the "Far East Conference Agreement", and a substantially true copy of which, as amended to December 4, 1947, is attached to the complaint herein as Exhibit A; that the parties to the Far East Conference Agreement, as aforesaid, at the time of the commencement of this suit, included all but one of the common carriers engaged with reasonable regularity in the transportation of property in the outbound Far East trade, and carry the major portion of all commercial cargoes transported in that trade; and except as in this Paragraph Twentieth specifically admitted, denies each and every allegation set forth and contained in the paragraph of the complaint numbered "29". The defendant reserves the right to offer in evidence upon the trial of this suit a true and accurate copy of the Far East Conference Agreement and all amendments thereof.

Twenty-first: Denies each and every allegation set forth and contained in the paragraph of the complaint numbered "31".

Twenty-second: Admits that the parties to the Far East Conference Agreement, acting under and pursuant to that agreement, have included in their tariffs with respect to

most commodities, both contract rates and non-contract rates; that contract rates are lower than non-contract rates; that the contract rates are available to all shippers who will enter into an agreement with the parties to the Far East Conference Agreement which, as the same has been from time to time and will hereafter be amended, is hereinafter referred to as the Far East Freight Agreement; and that Exhibit B attached to the complaint, is a substantially accurate copy of the form of the Far East Freight Agreement, revised as of August 15, 1945; and except as in this Paragraph Twenty-second specifically admitted, denies each and every allegation set forth and contained in the paragraphs of the complaint numbered "32", "33", "34", "35" and "36". The defendant reserves the right to offer in evidence upon the trial of this action a true and accurate copy of the Far East Freight Agreement as the same has been from time to time amended.

As and for a First Separate and Complete Defense, this Defendant Alleges:

Twenty-third: Heretofore and on or about September 1, 1922, the defendants Prince Line, Ltd. and Ellerman & Bucknall Steamship Co., Ltd. together with the United States Shipping Board, Merchant Fleet Corporation, and approximately nine other common carriers by water, in the outbound Far East trade, entered into the Far East Conference Agreement, and said Far East Conference Agreement was duly approved by the United States Shipping Board on November 14, 1922. Said parties entered into the Far East Conference Agreement at the instance and request of the plaintiff acting by and through the United States Shipping Board.

Twenty-fourth: The Far East Conference Agreement was entered into for the purpose of securing, and the performance of the parties to the Far East Conference Agreement has, with the exception hereinafter stated, secured, to the shippers and carriers in the outbound Far East trade and to the commerce of the United States generally, as hereinafter more fully alleged, the advantages and benefits for the securing and protection of which the Shipping [fol. 62] Act, 1916, and particularly Section 15 of said statute and its provisions for the approval of Conference agreements, were enacted.

Twenty-fifth: Since the date of the approval of the Far East Conference Agreement, all of the original parties thereto, excepting Prince Line, Ltd. and Ellerman & Bucknall Steamship Co., Ltd., have ceased to be parties to the Far East Conference Agreement; but there have been added to the parties to said agreement more than twenty new parties, certain of which consist of numerous ship-owning companies which are themselves organized as joint services pursuant to joint service agreements which have been filed with, and approved by, the United States Maritime Commission.

Twenty-sixth: Certain of such new parties, notably those of Japanese nationality, have ceased to be parties to the Far East Conference Agreement. As of the date of the commencement of this suit, there were twenty parties to the Far East Conference Agreement, including, for the purpose of such enumeration, collectively as a single party, the various companies which entered into each joint service agreement.

Twenty-seventh: In the entire period during which the Far East Conference Agreement has been in effect, the parties thereto have never denied participation in the Far East Conference Agreement and membership in the Far East Conference, to any common carrier by water which has applied for such participation and membership; and all such applications were granted and the applicants became parties to the Far East Conference Agreement and [fol. 63] members of the Far East Conference.

Twenty-eighth: The United States Maritime Commission, exercising its jurisdiction under and pursuant to the United States Shipping Act, 1916, the Merchant Marine Act, 1920 and the Merchant Marine Act, 1936, has adopted, and in its adjudicated reports has announced, a policy whereby its approval of any conference agreement under Section 15 of the Shipping Act, 1916, will be withdrawn in the event that the parties thereto shall exclude from full and equal participation therein, any common carrier by water who can give reasonable evidence of ability and intention in good faith to inaugurate and/or maintain a regular and dependable service in the trade which is within the scope of such conference agreement. Upon such disapproval of such conference agreement by the United States Maritime Commission, such agreement would become un-

lawful and it would be unlawful for the parties thereto to act further thereunder.

Twenty-ninth: The only common carrier by water operating with reasonable regularity in the outbound Far East trade and who is not, and who, at the date of the commencement of this suit, was not, a party to the Far East Conference Agreement and who, on information and belief, is the common carrier referred to in the paragraph of the complaint numbered "29", has made no application for participation in the Far East Conference Agreement and membership in the Conference. Said common carrier is hereinafter for convenience referred to as the "Second Outside Line". The Member Lines and the other parties [fol. 64] to the Far East Conference Agreement are ready, able and willing to admit the Second Outside Line upon its making application therefor to full and equal participation in the Far East Conference Agreement and full and equal membership in the Far East Conference.

Thirtieth: Upon information and belief, since the date of the approval of the Far East Conference Agreement, no person, firm or corporation has been deterred, hindered, precluded or prevented from engaging in the transportation of cargoes in the outbound Far East trade, as common carrier or otherwise, by the defendants or by the parties from time to time participants in the Far East Conference Agreement or by any acts or practices done or engaged in by them collectively or severally.

Thirty-first: In accordance with the purposes contemplated by the enactment of the Shipping Act, 1916, the Far East Conference Agreement and the performance of the parties thereto thereunder and in accordance with its terms, has, excepting during the periods hereinafter specified, resulted in the achievement of numerous advantages and benefits to the merchants, manufacturers and farmers of the United States, whose products are sold in the territories served by the parties to the Far East Conference Agreement, and great benefits and advantages to the agriculture, commerce and industry of the United States generally, including the following:

(a) The substantial increase in sailing opportunities in the outbound Far East trade.

(b) Fixed and dependable dates of sailings at regular intervals.

(c) Stability of freight rates over long periods of time, with the result, among many others, that the [fol. 65] American exporter has been able to quote prices and/or make contracts for future delivery in competition with foreign merchants, without fear of instability or of violent fluctuation in freight rates.

(d) Uniform freight rates have been made available to all merchants, manufacturers, farmers, or other exporters, irrespective of size or economic power.

(e) The elimination of weaker steamship lines has been prevented.

(f) Freight rates from the United States Atlantic and Gulf ports to the markets in the Far East have been maintained in proper relationship to the freight rates from foreign countries to those markets.

(g) The types of ships engaged in the outbound Far East trade have been immeasurably improved as respects speed, carrying capacity, refrigerated space, tank facilities and other characteristics.

The foregoing benefits and advantages have resulted in the general enhancement of the prosperity and security of the United States and of all of the elements of the economy thereof.

Thirty-second: Promptly upon the approval of the Far East Conference Agreement, the benefits and advantages described in Paragraph Thirty-first of this answer began to be operative and came to be progressively enjoyed by American exporting interests until in or about the year [fol. 66] 1928. As an aid to the securing of such benefits and advantages by the elimination of uneconomic and destructive rate competition between the parties to the Far East Conference Agreement and the parties to an agreement known as the Pacific Westbound Conference Agreement, being U. S. Maritime Commission Agreement No. 57, the parties to the two said Conference agreements entered into a joint agreement dated March 2, 1925, which was duly approved by the United States Shipping Board and which provided that the parties to the two said Conference agreements might, as in said agreement stipulated, work cooperatively in the fixing of rates for the carriage of cargoes from Pacific Coast ports, on the one hand, and Atlantic Coast ports and Gulf of Mexico ports, on the other hand, to the various ports in the Far East. Said agree-

ment of March 2, 1925 contained, among others, a provision to the effect that neither Conference, party thereto, could reduce freight rates until thirty days after notice of such decrease should be given to the other conference.

Thirty-third: In or about the year 1928, a corporation, hereinafter referred to as the "First Outside Line", initiated a steamship service as a common carrier by water in the outbound Far East trade. Upon information and belief, the management of said First Outside Line was the predecessor in business of the Second Outside Line. The First Outside Line conducted its services by use of vessels owned by two ship-owning companies. Since the outbreak of the Second World War, said ship-owning companies discontinued furnishing vessels to the First Outside Line [fol. 67] and established a joint service in the outbound Far East Trade under their own management, and are now parties to the Far East Conference Agreement and are among the defendants named herein. Upon information and belief, the management of the said First Outside Line thereupon, through another corporate form, acquired vessels of its own and became and now is the Second Outside Line. Upon information and belief, the principal officers and those in executive charge of the business of the Second Outside Line and of the First Outside Line are identical and the policies and methods of business and competition are similar and have, with interruption only by the Second World War, been continuous.

Thirty-fourth: In or about the year 1928, the First Outside Line began and thereafter continued to engage in the practices, among others, (a) of quoting and charging freight rates fractionally under the rates fixed and established by the parties to the Far East Conference Agreement, and (b) offering to freight brokers exorbitant brokerages for diverting the cargoes of their principals to the First Outside Line. The practices of the First Outside Line resulted in a demoralization of the traffic in the outbound Far East Trade to such an extent that the exporters from the United States in said trade were unable to know from day to day what freights they would be required to pay for the transportation of their cargoes in the outbound Far East trade. The parties for the time being to the Far East Conference Agreement, as a means of eliminating said demoralization, invited and urged the First Outside Line to become a party [fol. 68] to the Far East Conference Agreement; but the

First Outside Line refused so to do unless, as a condition of its so doing, the Conference would agree that the First Outside Line might treat certain of its shippers preferentially. The parties for the time being to the Far East Conference Agreement refused to concede these illegal conditions.

Thirty-fifth: (a) That in or about the year 1929, in order to attempt a stabilization of the commerce between all United States ports and ports in the Far East, the parties for the time being to the Far East Conference Agreement and the parties to the Pacific Westbound Conference Agreement, acting under said joint agreement dated March 2, 1925, and not otherwise, established with respect to certain commodities two levels of rates, the lower of which was made available to all shippers who entered into an agreement with the parties to the said two Conference agreements, to ship their commodities by vessels of said parties. Similar agreements were entered into in the year 1930, with respect to a somewhat larger group of commodities.

(b) The establishment of said rates and the entry into said agreements proved incapable of eliminating said demoralization; and, in the premises, the parties for the time being to the Far East Conference Agreement determined that the competitive methods pursued by the First Outside Line required that said parties should be able to reduce the rates within the scope of their Conference agreement more speedily than was possible, because of said provision for [fol. 69] thirty days' notice, so long as said agreement dated March 2, 1925 continued in effect. Accordingly, in September 1930, the parties for the time being to the Far East Conference Agreement took measures to terminate said agreement dated March 2, 1925, and said agreement was thereupon so terminated.

(c) In or about February 1931, the said competition became so disruptive that nine of the eleven members of the Far East Conference gave notice under the Far East Conference Agreement of their withdrawal therefrom, to take effect on May 6, 1931, and said Far East Conference was threatened with extinction. Prior to the latter date, however, five of the nine members who had given such notice retracted the notices so given by them and in the following September three of the remaining four members rejoined the Conference in an effort to restore stability.

Thirty-sixth: Thereupon and in the years 1931, 1932, 1933 and 1934, the parties for the time being to the Far East Conference Agreement, acting pursuant to the Far East Conference Agreement and not otherwise, but without cooperation with the parties to any other conference agreement, established two levels of rates, known as contract and non-contract rates, with respect to certain commodities and made the lower or contract rates available to all shippers of such commodities who would enter into the forms of agreement adopted in said respective years, providing in substance that the shippers of such commodities would ship the same to ports in the Far East exclusively by the vessels owned and/or operated by the parties to the Far East Conference Agreement.

[fol. 70] Thirty-seventh: Notwithstanding the measures taken as aforesaid, the conditions prevailing in the commerce in the outbound Far East trade had, due to the competitive methods of the First Outside Line, deteriorated to such an extent by March 1934, that the Department of Commerce, Shipping Board Bureau, which then exercised the jurisdiction now vested in the United States Maritime Commission, on its own motion, instituted an investigation pursuant to the provisions of Section 19 of the Merchant Marine Act, 1920, to determine what rules and regulations it might promulgate to correct or to alleviate the disruptive conditions brought about as aforesaid. As the result of the said investigation, the said Shipping Board Bureau promulgated its report in a proceeding known as "Docket 128-Investigation-Section 19 of the Merchant Marine Act, 1920"; which is reported at U. S. Maritime Commission 470. In said report, the said Shipping Board Bureau fully described and thereupon condemned the said disruptive competitive methods of the First Outside Line and the effects thereof on the commerce of the United States. The defendant respectfully asks leave to, and does hereby, incorporate herein by reference the aforesaid report of the said Shipping Board Bureau.

Thirty-eighth: As the result of said investigation, the said Shipping Board Bureau determined that its powers in the premises were limited to the issuance of an order, which it thereupon issued, requiring common carriers in outbound trades from United States ports, to file with it, within thirty

days after adoption, copies of their tariffs and modifications thereof.

[fol. 71] Thirty-ninth: Inasmuch as such filing was not required to be made until thirty days after the adoption of the respective rates, the said order resulting from said investigation, although affording some relief, was not adequate to remedy the conditions which afflicted the commerce of the United States as aforesaid.

Fortieth: Under the circumstances aforesaid, and acting pursuant to the Far East Conference Agreement and not otherwise, (a) the parties to the Far East Conference Agreement, in the years 1935 and 1936, continued the establishment of tariffs with respect to an increasing number of the commodities moving in the Far East trade at two levels of rates—contract rates and non-contract rates—of which the contract rates were lower, and made said contract rates available to all shippers of the commodities with respect to which contract rates were established, who should enter into an agreement with the parties for the time being to the Far East Conference Agreement, to the effect that such contracting shippers would ship all of their said commodities destined for ports in the Far East by vessels owned and/or operated by the parties for the time being to the Far East Conference Agreement; (b) in or about the year 1937, changed the form of said contract with said shippers so that the same became in substance the Far East Freight Agreement which, with various changes and amendments, resulted in the form attached to the complaint and marked Exhibit B; and (c) in or about the month of March, 1936, and continuously thereafter, made note of the application of the said contract and non-contract rates in their Conference tariffs and duly filed successively with the United States Shipping Board Bureau of the Department of Commerce and with the United States Maritime Commission said tariffs, said successive forms of the Far East Freight Agreement, and minutes of all Conference meetings at which such tariffs and/or agreement forms were adopted or amended. The form of Far East Freight Agreement which was in effect prior to the outbreak of the Second World War, provided that the rates of freight could be increased only after ninety days' notice to the shipper, and that the agreement could be cancelled only on ninety days' notice. In September 1939, at the outbreak of said War,

and due to the conditions incident to the War and the measures taken by the various governments in connection therewith, the said ninety day periods were respectively shortened to thirty days. The present parties to the Far East Conference Agreement have duly taken action to amend the outstanding Far East Freight Agreements, effective December 1, 1948, and to change the form thereof with respect to shippers who shall enter therein subsequent to December 1, 1948, so that the same shall be in accordance with the form hereto attached, marked Exhibit 1, and made a part of this answer.

Forty-first: The parties to the Far East Conference Agreement enter into Far East Freight Agreements with, and make contract rates available to, all shippers in the outbound Far East trade who desire to enter into such agreements without preference or discrimination; and at all of the times mentioned in the paragraphs hereof numbered Thirty-fifth (a), Thirty-sixth and Fortieth, have entered into the agreements therein referred to with, and made the contract rates available to, all shippers in the outbound Far East trade without preference or discrimination.

[fol. 73] Forty-second: Notwithstanding the beneficial effects of the order entered by the United States Shipping Board Bureau of the Department of Commerce in Docket 128 as aforesaid, and notwithstanding the action taken by the parties from time to time to the Far East Conference Agreement as aforesaid with respect to the establishment of contract and non-contract rates, conditions of stability had not returned in the Far East trade at the time of the outbreak of said War in 1939. As shippers and exporters generally came to appreciate the disruptive effect upon their affairs of the continuance of the conditions aforesaid, they, in increasing numbers, became parties to Far East Freight Agreements, with the result that, since the cessation of hostilities, the major portion of the export commerce of the United States in the outbound Far East trade, is transported under and pursuant to Far East Freight Agreements.

Forty-third: As a result of the adoption of the Far East Freight Agreement and the application thereunder of said contract rates, the Far East Conference has, since the termination of hostilities, again been able to establish conditions substantially as they existed prior to 1928 in the out-

bound Far East trade, and to extend to the merchants, farmers and manufacturers of the United States the advantages arising from conference action, including those enumerated in the paragraph hereof numbered Thirty-first.

Forty-fourth: The United States Maritime Commission and its predecessors in authority have repeatedly upheld the establishment of contract and non-contract rates and the use in connection therewith of agreements of the character represented by Exhibit B annexed to the complaint and more particularly of a character represented by Exhibit 1 hereto attached as constituting a proper practice by conferences acting pursuant to agreements approved under Section 15 of the Shipping Act, 1916, so long as said respective conferences should permit full and equal participation therein by all common carriers in the respective trades who should give evidence of ability and intention in good faith to establish and/or maintain a regular and dependable service in the respective trades. Such rulings on the part of the said Maritime Commission and its said predecessors are to be found, among others, in the following of their official reports:

Docket No. 80. *The W. T. Rawleigh Co. v. M. V. Stoomvaart Mij. "Nederland", et al.*, 1 USSB 285 (1933);

Docket No. 648. *Pacific Coast/European Conference Agreement*, 3 USMC 11 (1948);

Docket No. 423. *Phelps Bros. & Co., Inc. v. Cosulich-Societa, etc.*, 1 USMC 634 (1937);

Docket No. 515. *Sprague Steamship Agency, Inc. v. A/S Ivarrens Rederi, et al.*, 2 USMC 72 (1939).

Forty-fifth: Pursuant to said rulings of the United States Maritime Commission, conferences in many of the most important trades have adopted such rates and similar contracts; and the welfare and stability of an important part of the commerce of the United States is dependent upon the continuance thereof.

Forty-sixth: It would be economically impossible for the defendants to continue to afford to the merchants, farmers and manufacturers who ship their merchandise in the outbound Far East trade, the advantages of conference operation, including those enumerated in Paragraph Thirty-first, without tariffs of the type adopted by the Far East Conference as aforesaid and without said Far East Freight

[fol. 75] Agreement. The defendants have invested, and if their frequent service with speedy and especially adapted vessels is to be maintained, must continue to invest, large sums of money in the construction of progressively more modern vessels. Such investment would be discouraged or halted unless the steamship owners are assured of the regular patronage of a considerable body of shippers at compensatory rates of freight. Although the shippers in every industry benefit when all of them are charged fair and reasonable rates of freight with stability maintained over long periods of time, nonetheless, the individual shipper, when offered an opportunity to ship at fractionally lower rates, tends to seek this advantage over his competitors and these competitors are thereby of necessity compelled, likewise, to seek similarly lowered shipping charges. As a consequence, unless such contract and non-contract tariffs are maintained, disruptive conditions such as those described in said Docket 128—Investigation-Section 19 Merchant Marine Act, 1920 will prevail, with the result that (a) the weaker steamship lines who are unable to endure cut-throat competition will be eliminated, and (b) the remaining Conference members, faced by a reduction of their revenues to the point where they cease to provide compensation for the regular and speedy services which had theretofore been maintained, will be forced to choose between abandoning their services in the trade altogether and conducting them with little or no regularity and with inferior tonnage, so that the service rendered will be commensurate with the compensation received.

[fol. 76] Forty-seventh: The exporters of agricultural and industrial products from British and European ports to the Far East market enjoy all of the benefits arising from ocean freight rates fixed by Conference action, including those enumerated in Paragraph Thirty-first, for the reason, among others, that the laws of Great Britain and of the continental European Countries permit the Conferences to avail themselves not alone of the practice of adopting contract and non-contract rates, the former of which are available to shippers who enter into contracts of a purport generally similar to Exhibit B annexed to the complaint, but also permit the parties to Conference agreements to adopt other methods of avoiding destructive and disruptive competition which have been rendered illegal by the Ship-

ping Act, 1916, as amended. Unless the defendants are permitted to continue the practice of adopting contract and non-contract rates, accompanied by agreements such as Exhibit B annexed to the complaint or Exhibit 1 hereto annexed, the shippers of the products of American factories and farms, being deprived of said advantages, will be unable to compete with the exporters of such products from Great Britain and Europe and will be unable to compete fairly among themselves because of the inevitable discriminations and fluctuations in freight rates which would result.

Forty-eighth: At all times since the establishment of the tariffs of rates as aforesaid and the adoption of said Far East Freight Agreement, the rates of freight from time to time established by the parties to the Far East Conference Agreement have been fair and reasonable and have been applied without preference or discrimination.

[fol. 77] Forty-ninth: By reason of the premises, (a) to the extent, if any, that the acts of the defendants alleged in the complaint have effected any restraint of the foreign trade and commerce of the United States, said restraint has been fair and reasonable and necessary in the interest of American industry, commerce and agriculture and of the common carriers in the outward Far East trade; and (b) all of the acts of the defendants alleged in the complaint have been done and performed under and pursuant to an agreement duly filed and duly approved in accordance with the provisions of Section 15 of the Shipping Act, 1916, as amended, and are accordingly excepted from the provisions of Sections 1 and 2 of the Act of July 2, 1890, as amended, known as the Sherman Antitrust Act.

As a Second Separate and Complete Defense, This Defendant Alleges:

Fiftieth: Heretofore and prior to January 12, 1948, a number of common carriers by water in the trade between United States Pacific Coast ports and European ports, filed with the United States Maritime Commission for approval pursuant to the provisions of Section 15 of the Shipping Act, 1916, as amended, an agreement known as the Pacific Coast/European Conference Agreement, being Agreement Nos. 5200 and 5200-2.

*Fifty-first: The United States Maritime Commission duly instituted an investigation upon its own motion to deter-

mine whether the said agreements should be approved or disapproved.

[fol. 78] Fifty-second: Upon information and belief, the Antitrust Division of the United States Department of Justice intervened in said proceeding and challenged the legality of the practice of the Pacific Coast/European Conference in charging for transportation at two levels of rates and of obtaining from their shippers contracts of the general character of that represented by Exhibit B attached to the complaint, on the ground that these practices are monopolistic, result in different rates for identical services and because the contract with the shipper is not subject to approval under Section 15 of the Shipping Act, 1916, and therefore is not subject to exemption from the Antitrust Act and for other reasons.

Fifty-third: Upon information and belief, the United States Maritime Commission, subject to an amendment of the form of freight contract to be tendered to shippers, overruled the objection of the Antitrust Division of the Department of Justice on the ground that the members of the Conference had at no time denied membership to any applicant carrier, and that the contract rate system is a necessary practice in the trade to secure the continuance of the Conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates.

Fifty-fourth: Upon information and belief, said antitrust Division of the United States Department of Justice has taken no action to obtain judicial review of the aforesaid determination of the United States Maritime Commission.

[fol. 79] As a Third Separate and Complete Defense, This Defendant Alleges:

Fifty-fifth: This defendant repeats Paragraphs Twenty-third to Forty-ninth, both inclusive, of this answer.

Fifty-sixth: This defendant alleges that under the provisions of the Shipping Act of 1916 and the Merchant Marine Act of 1936, the exclusive preliminary power and jurisdiction is vested in the Maritime Commission to determine whether the Far East Conference agreement made by the defendants, to which reference is made in the complaint, is a lawful agreement, and whether or not the contract rates and the other rates established by the defendants in the manner provided by said agreement are just and reasonable

and in all respects lawful, and whether or not the Far East Freight Agreements above mentioned are in all respects lawful agreements, and also whether or not the conduct of the defendants mentioned in the complaint is in all respects lawful.

Fifty-seventh: That such determination depends upon a consideration by said Commission of the economic relations of facts peculiar to the business of the defendants, of competitive conditions in respect of shipping to foreign countries and of all relevant circumstances unfamiliar to a judicial tribunal, but well understood by said Commission.

Fifty-eighth: In view of the provisions of said Act of 1916 and said Act of 1936, this court is without power or jurisdiction to consider or determine in this cause the legality of said agreements or of the contract rates, or other rates established by the defendants in the manner provided by said Far East Conference agreement, or of any of the acts of the defendants mentioned in said complaint.

[fol. 80] Fifty-ninth: The said Maritime Commission has duly approved the said Far East Conference agreement and has not disapproved any of said agreements or the contract rates, or the other rates established by the defendants in the manner provided by said Far East Conference agreement or any of the conduct or acts done under said Far East Conference agreement by any of the defendants herein, although said Maritime Commission has, at all times, been fully informed as to such rates, conduct and acts.

As a Fourth Separate and Complete Defense, This Defendant Alleges:

Sixtieth: The complaint fails to state a claim against this defendant upon which relief can be granted.

As a Fifth Separate and Complete Defense, This Defendant Alleges:

Sixty-first: This Court lacks jurisdiction over the subject matter of this action (a) because agreements between common carriers by water in foreign commerce in respect of competition and cooperative arrangements and the fixing of rates and the establishment of tariffs and of the rules and regulations relative to the application thereof, are within the exclusive jurisdiction of the United States Maritime Commission under the Shipping Act, 1916, as amended,

(b) because the alleged acts of the defendants as set forth in the complaint are claimed to have occurred in respect of matters subject to the exclusive jurisdiction, supervision and regulation of the United States Maritime Commission which is authorized by law to afford a complete remedy by [fol. 81] means of investigation, decision and appropriate order, (c) because the plaintiff has no right to apply to this Court for injunctive relief in advance of investigation, decision and order by the United States Maritime Commission with respect to the matters alleged in the complaint, or in advance of any violation by the defendants of such order as the United States Maritime Commission might make pursuant to such investigation, and (d) because a judicial remedy does not lie in such case until the administrative remedy before the United States Maritime Commission shall have been finally and completely exhausted.

As a Sixth Separate and Complete Defense, This Defendant Alleges:

Sixty-second: The plaintiff has a full, adequate and complete remedy at law before the United States Maritime Commission.

Wherefore, the defendant prays judgment that the complaint herein be dismissed.

Dated: October 4, 1948.

Stryker, Tams & Horner, By: Josiah Stryker, a member of the Firm, Solicitors for Defendant, Isthmian Steamship Company, Office & P. O. Address 744 Broad Street, Newark 2, New Jersey.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 82]

EXHIBIT 1 TO ANSWER

Far East Freight Agreement

Contract No.

Memorandum of Agreement, made the day of ,
19 , by and between here-
inafter called the Shipper, and Members of Far East Con-
ference, designated below and hereinafter called the Car-
riers, it being understood and agreed to by the Shipper
and by the Carriers that if the Far East Conference add
any additional line or lines to their membership, such line

or lines shall thereby become party to this Agreement, and the Shipper shall have the right to request shipping space of such line or lines as in this Agreement provided; and should any line or lines cease to be members of said Conference, all future rights under this Agreement of such line or lines, and of the Shipper as to any such line or lines, shall thereupon terminate.

1. The Shipper, in consideration of the rates and other conditions stated herein agrees to forward by vessels of the Carriers all shipments made, directly or indirectly, by him, his agents, subsidiary, associated and/or parent companies and shipped from United States ports, excepting, however, Pacific Coast ports, to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and Philippine Islands.

The commodities involved, the estimated quantities, and the rates and conditions to govern are shown on the attached supplement or supplements. It is mutually understood and agreed that if Shipper should subsequently forward any commodity other than those shown on attached supplement or supplements, said shipments are considered to be part of this Agreement, and therefore entitled to the lowest rate then in effect on such commodity without requiring Shipper to conclude a supplemental agreement with the Carriers.

2. The rates of freight named or provided for hereunder are subject to being increased reasonably from time to time by the Carriers giving the Shipper written notice thereof not less than ninety (90) days in advance of the increase. Increases shall be deemed accepted by the Shipper unless he notifies the Carriers to the contrary within thirty (30) days from the receipt of said notice. Within said thirty days, the Shipper may give the Carriers written notice of cancellation of this contract as of the effective date of the increased rate or rates, subject, nevertheless, to the option on the part of the Carriers, declarable not less than thirty (30) days prior to the effective date of the increase in rate or rates, either to accept the cancellation, or to continue this contract in force under the rates in effect at the date when the notice of increase shall have been given. Recognizing that it will be impracticable for the Carriers to give notices of increases of all rates to all contracting shippers, it is agreed that the Carriers shall furnish to the

Shipper notices of all increases in rates applicable only to the commodity or commodities specified in the attached supplement or supplements and such additional commodity or commodities as to which the Shipper shall have given written notice to the Chairman of the Far East Conference of his intention to ship.

Should the Carriers, during the term of this Agreement reduce rates on any commodities which are covered by the [fol. 83] attached supplement or supplements, or which are mentioned in any notice given by the Shipper to the Carriers as aforesaid, the Shipper shall be given the full benefit of such reduced rates during the period the same remain in effect; provided, however, that nothing herein contained is intended to preclude the Carriers from furnishing transportation for goods not intended for commercial or industrial use, shipped by governments, governmental agencies or public or private, national or international, charitable, eleemosynary or humanitarian agencies, or religious or missionary societies, at rates lower than the rates herein provided for; and if the Carriers do so carry at such lower rates, the Shipper shall have no right hereunder to require the Carriers to transport for the Shipper at such lower rates.

3. The Carriers undertake, throughout the period of this Agreement, to maintain a steamship service which shall, so far as concerns the frequency of sailings and the carrying capacity of their vessels, be adequate to meet all of the reasonable requirements of the commerce of the United States moving in the trades specified in Paragraph 1 hereof; and the Carriers further agree that, subject to the availability of unbooked space in the vessels of the Carriers at the time when the Shipper applies therefor, the vessels of the Carriers shall, subject to the provisions of Paragraph 5 hereof, transport the cargoes of the Shipper in the aforesaid trade, upon the terms and conditions herein set forth.

The Shipper shall have the option of selecting any of the vessels operated by any of the respective Carriers who at time of shipment are Members of the Far East Conference, provided that the required space to port of destination is available in the vessels selected either direct or with trans-shipment at the time when the Shipper makes application therefor. The Shipper shall be required to reach agreement with the respective Carriers as to the

quantity to be shipped per vessel, port or ports of loading, port or ports of discharge, and to apply for freight space as long prior to the vessel's advertised sailing date is practicable. If the Carriers do not furnish space after the Shipper duly applies therefor, the Shipper shall be free, with respect to such shipment, to secure space elsewhere without prejudice to his right to future shipments under this Agreement, provided that the Shipper first notifies the Chairman of the Far East Conference at New York and allows the Chairman forty-eight (48) hours from the receipt of such notice to confirm that such space is not available.

4. If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impracticable to determine. Such liquidated damages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate or rates currently in effect. Failure of the Shipper to pay liquidated damages within thirty (30) days after the receipt of notice from the Conference that such liquidated damages are due and payable shall be cause for the Conference to terminate the Shipper's right to the contract rates until the Shipper pays to the Conference the amount due. In the event the Shipper violates this contract more than once in any period of twelve months, the Conference may cancel this contract by serving written notice of such [fol. 84] cancellation upon the Shipper and notifying the Maritime Commission of such action. If the Contract is cancelled for violation thereof as provided herein, the Conference may refuse to enter into a new contract with the Shipper until any unpaid liquidated damages due to the Conference have been paid in full.

In order that the Conference may determine the existence or non-existence of a violation hereof, the Shipper shall, upon request, furnish to the Conference full and complete information with respect to any shipment or shipments made by such Shipper in the trade covered by this Agreement.

5. Shipments under this Agreement are subject to all the terms and conditions contained in the respective Carrier's engagement note, permit, dock receipt and/or regu-

lar form of bill of lading, in use by the Carrier when shipments are tendered.

6. In the event of any hostilities breaking out or threatening to break out, in which the United States and/or Great Britain and/or Japan and/or China and/or Indo-China and/or Russia and/or their Colonies are involved, or by which the Carriers' interests are affected, the Carriers have the option of cancelling this Agreement.

7. In compliance with Section 16 of the "Shipping Act, 1916," payment by the Carriers and the acceptance of freight brokerage by the broker is with the strict understanding that no part of the brokerage thus collected shall revert to the Shipper, or to the consignee, and that the business of the broker is in no sense subsidiary to or affiliated with that of the Shipper or of the consignee.

8. Any disputes between the parties hereto arising out of this Agreement or involving the interpretation or effect thereof, shall be referred to a board of three arbitrators, one of whom shall be appointed by the Shipper, the second of whom shall be appointed by the Carriers, and the third of whom shall be appointed by the two arbitrators appointed as aforesaid. The decision of any two of said arbitrators with respect to any matter submitted to them as aforesaid, including, but without limitation, the amount of damages arising from any breach of this Agreement, shall be final and binding upon the Shipper and the Carriers and, for the purpose of enforcing any such award, the same shall be made a rule of the Court.

9. This Agreement, subject to the conditions set forth herein, may be terminated upon ninety (90) days written notice by the Shipper, or by all of the Carriers, or by any one or more of the Carriers (in which case such cancellation shall be effective only as to the notifying Carriers). If this Contract shall be terminated as to some, but not all, Carriers, the Shipper shall be at liberty to ship by such terminating Carriers so long as such terminating Carrier or Carriers remain members of the Far East Conference without thereby violating this Contract.

10. In the event of threat, existence or continuance of any present or future war or war-like conditions or hostilities or civil commotion, or measures taken by any Government in consequence thereof or in connection therewith, or the existence or continuance of conditions which, in the opinion of any one or more of the Carriers, indicates that

there is a danger of any of the foregoing, which may [fol. 85] impede, obstruct or delay, or render impossible or hazardous performance of its or their obligations due to the requisition, seizure or loss of any of the vessels of any one or more of the Carriers, or any other cause whatsoever whether similar or dissimilar, or which, in the sole judgment of any one or more of the Carriers, may directly or indirectly result in the imposition upon it or them of any undue financial or other hardship or burden in the performance of its or their obligations, any one or more of the Carriers shall have the option of forthwith cancelling this Agreement as to it or them. If this Agreement shall be cancelled as to some but not all of the Carriers the Shipper shall be at liberty to ship by such cancelling Carrier or Carriers so long as such cancelling Carrier or Carriers remain members of the Far East Conference without thereby violating this Agreement.

11. It is agreed that the party herein referred to as the Shipper is not the agent or Broker for any principal, whether disclosed or undisclosed, and that no party who is not named herein or at the foot hereof shall have any rights as Shipper by virtue hereof.

List of Carriers:

(Shipper)

By

Title

(Address of Shipper)

Subsidiary, Associated and/or
Parent Companies:

For and on Behalf of Members
of Far East Conference:

By

Chairman

11 Broadway, New York 4,
N. Y.

(Address of Shipper Must be Shown on Contract)

[fol. 86] IN THE DISTRICT COURT OF THE UNITED STATES
IN THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF MOTION—Filed December 29, 1949

To: Elkan Turk, Of Counsel for Defendants Far East Conference, et. al., No. 120 Broadway, New York, New York

Please take notice that the undersigned will bring the motion for judgment on the pleadings heretofore filed in this action on for hearing before this Court in Courtroom No. 5, United States Post Office Building, City of Newark, on the 3rd day of January, 1950, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Joseph E. McDowell, Trial Attorney, Attorney for Plaintiff

3 Clerk's Certificate to foregoing paper omitted in printing.

Certificate of Service

I hereby certify that I have this day served the foregoing this proceeding, by mailing via first-class mail, postage notice of motion upon all parties of record appearing in prepaid, a copy thereof, properly addressed, to each such party.

Joseph E. McDowell, Trial Attorney

Dated at Washington, D.C. this 21st day of December 1949. Room 3119, Department of Justice, Washington, D. C.

[fol. 87] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

MOTION TO DISMISS AND NOTICE OF MOTION—Filed January 4,
1951

The defendants above named, other than Isthmian Steamship Company, hereby move the Court as follows:

A. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

B. To dismiss the action because the complaint fails to state facts sufficient to show that the plaintiff has no remedy otherwise than in equity.

C. On the complaint and answer herein,

(1) to dismiss the action on the ground that this Court is without jurisdiction of the subject matter

(a) in that agreements between common carriers by water in foreign commerce in respect of competition and cooperative arrangements and the shipping contracts and other practices adopted by such carriers in connection with rates established by them pursuant to such agreement between common carriers by water in the foreign commerce are within the exclusive jurisdiction of the United States Maritime Commission under the Shipping Act, 1916, as amended; and

(b) in that the alleged practices of the defendants mentioned in the complaint are within the exclusive jurisdiction of the United States Maritime Commission under the Shipping Act, 1916, as amended; and

[fol. 88] (c) in that the alleged acts of the defendants set forth in the complaint are alleged to have occurred in respect of matters subject to the jurisdiction, supervision and regulation of the United States Maritime Commission, which is authorized by the Shipping Act, 1916, as amended, to afford complete remedy by means of investigation, decision and appropriate order; and

(d) in that the acts alleged in the complaint constitute charges of violations of the provisions of the

Shipping Act, 1916, as amended, which, to the extent of said acts and charges, supercedes the antitrust laws mentioned and referred to in the complaint and the remedy for said acts and charges is that afforded by the Shipping Act, 1916, as amended; and

(e) in that this Court has no power by way of injunction in advance of investigation, decision and order by the United States Maritime Commission in respect of the acts and charges alleged in the complaint or in advance of any violation by the defendants of such order as the United States Maritime Commission might make pursuant to such investigation and decision, or, in the alternative,

(2) to stay and suspend all proceedings herein until

(a) such time as the United States Maritime Commission, in an appropriate proceeding instituted therefor, shall have investigated the acts, matters and charges alleged in the complaint, and shall have made its decision and order with respect thereto pursuant to the primary jurisdiction thereunto vested in the United States Maritime Commission by law; and

(b) the plaintiff shall have completely exhausted all administrative remedies in such case made and provided.

NOTICE OF MOTION

Please Take Notice, that the undersigned will bring the above motion on for hearing before this Court in Courtroom No. 5, United States Post Office Building, Newark, New Jersey, on the 9th day of January, 1950, at 10:30 [fol. 89] o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: Jersey City, N. J., January 3d, 1950.

Milton, McNulty & Angelli, By (S.) John Milton,
Member of the Firm. Solicitors for defendants
herein other than Isthmian Steamship Company,
Office & P. O. Address, 1 Exchange Place, Jersey
City, N. J.

To James E. Kilday, Esq., Asst. to the Attorney General
and Joseph E. McDowell, Esq., Trial Attorney and Herbert
A. Bergson, Esq., Asst. Attorney General, Room 3119, De-

partment of Justice, Washington, D. C.; Alfred E. Modarelli, Esq., U. S. Attorney, U. S. Post Office Building, Newark, N. J.; Stryker, Tafts & Horner, Esqs., Solicitors for defendant, Isthmian Steamship Company, 744 Broad Street, Newark, N. J.

Clerk's Certificate to foregoing paper omitted in printing

[fol. 90] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

MOTION TO DISMISS AND NOTICE OF MOTION—Filed January
13, 1950

Isthmian Steamship Company, one of the defendants above named, hereby moves the Court as follows:

A. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

B. To dismiss the action because the complaint fails to state facts sufficient to show that the plaintiff has no remedy otherwise than in equity.

C. On the complaint and answer herein,

(1) To dismiss the action on the ground that this Court is without jurisdiction of the subject matter—

(a) in that agreements between common carriers by water in foreign commerce in respect of competition and cooperative arrangements and the shipping contracts and other practices adopted by such carriers in connection with rates established by them pursuant to such agreement between common carriers by water in the foreign commerce are within the exclusive jurisdiction of the United States Maritime Commission under the Shipping Act, 1916, as amended; and

(b) in that the alleged practices of the defendants mentioned in the complaint are within the exclusive jurisdiction of the United States Maritime Commis-

sion under the Shipping Act, 1916, as amended; and [fol. 90a] (c) in that the alleged acts of the defendants set forth in the complaint are alleged to have occurred in respect of matters subject to the jurisdiction, supervision and regulation of the United States Maritime Commission, which is authorized by the Shipping Act, 1916, as amended, to afford complete remedy by means of investigation, decision and appropriate order; and

(d) in that the acts alleged in the complaint constitute charges of violations of the provisions of the Shipping Act, 1916, as amended, which, to the extent of said acts and charges, supersedes the antitrust laws mentioned and referred to in the complaint and the remedy for said acts and charges is that afforded by the Shipping Act, 1916, as amended; and

(e) in that this Court has no power by way of injunction in advance of investigation, decision and order by the United States Maritime Commission in respect of the acts and charges alleged in the complaint or in advance of any violation by the defendants of such order as the United States Maritime Commission might make pursuant to such investigation and decision, or, in the alternative,

(2). to stay and suspend all proceedings herein until

(a) such time as the United States Maritime Commission, in an appropriate proceeding instituted therefor, shall have investigated the acts, matters and charges alleged in the complaint, and shall have made its decision and order with respect thereto pursuant to the primary jurisdiction thereunto vested in the United States Maritime Commission by law; and

(b) the plaintiff shall have completely exhausted all administrative remedies in such case made and provided.

Notice of Motion

Please take Notice, that the undersigned will bring the above motion on for hearing before this Court in Courtroom No. 5, United States Post Office Building, Newark, New Jersey, on the 19th day of January, 1950, at 10:30 o'clock in

[fol. 91] the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: Newark, N.J., January 10, 1950.

Stryker, Tams & Horner, By Josiah Stryker, Member of the Firm, Solicitors for Isthmian Steamship Company, one of the defendants, Office & P. O. Address, 744 Broad Street, Newark 2, New Jersey.

To: James E. Kilday, Esq., Asst. to the Attorney General, and Joseph E. McDowell, Esq., Trial Attorney, and Herbert A. Bergson, Esq., Asst. Attorney General, Room 3119, Department of Justice, Washington, D.C., Alfred E. Modarelli, Esq., U. S. Attorney, U. S. Post Office Building, Newark, N.J., Milton, McNulty & Augelli, Esqs., Solicitors for defendants other than Isthmian Steamship Company, 1 Exchange Place, Jersey City 2, N.J.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 92] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

MOTION AND NOTICE OF MOTION FOR LEAVE TO SERVE
SUPPLEMENTAL ANSWER—Filed January 4, 1951

Upon the complaint and answer herein and upon the annexed petition of the defendants herein other than Isthmian Steamship Company, said defendants hereby move for leave to serve a supplemental answer herein, setting forth transactions and occurrences which have happened since the date of the service of the answer herein hereby sought to be supplemented. A copy of such supplemental answer is attached to the annexed petition.

Please take Notice, that the undersigned will bring the above motion on for hearing before this Court in Courtroom No. 5, United States Post Office Building, Newark, New

Jersey, on the 9th day of January, 1950, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: Jersey City, N.J., January 3rd, 1950.

Milton, McNulty & Augelli, By John Milton, Member of the Firm, Solicitors for defendants herein other than Isthmian Steamship Company, Office & P.O. Address, 1 Exchange Place, Jersey City, N.J.

[fol. 93] To: James E. Kilday, Esq., Asst. to the Attorney General, and Joseph E. McDowell, Esq., Trial Attorney, and Herbert A. Bergson, Esq., Asst. Attorney General, Room 3119, Department of Justice, Washington, D. C., Alfred E. Modarelli, Esq., U.S. Attorney, U.S. Post Office Building, Newark, N.J., Stryker, Tams & Horner, Esqs., Solicitors for defendant, Isthmian Steamship Company, 744 Broad Street, Newark, N.J.

[fol. 94] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

PETITION FOR LEAVE TO FILE A SUPPLEMENTAL
ANSWER—Filed January 4, 1951

Now come the defendants above named other than Isthmian Steamship Company, and petition this Honorable Court for leave to file a supplemental answer, and respectfully show:

1. That on or about August 6, 1948, the plaintiff above named filed its complaint against the above named defendants, alleging that certain acts on the part of the defendants constitute violations of Section 1 and Section 2 of the Act of July 2, 1890, as amended, known as the Sherman Anti-trust Act. That in the said complaint it was alleged that the defendants in this suit had entered into a conspiracy, and in Paragraph 34 of the complaint, it was alleged that the purpose and object of the conspiracy has been to drive out of and exclude from participation in the trade therein referred to as the "outbound Far East trade" and to

eliminate from competition therein, steamship lines not parties to the alleged unlawful combination and conspiracy and thereby to achieve and maintain a monopoly of the transportation of cargo in said trade. That in Paragraph 29 of the complaint, it was alleged that the membership of [fol. 95] the defendant, Far East Conference, includes all but one of the common carrier shipping lines regularly engaged in the transportation of property in said outbound Far East trade.

2. That thereafter and on or about October 1, 1948, your petitioners duly filed their answer to the aforesaid complaint. That at the time of the filing of the complaint, as aforesaid, and at the time of the filing of the answer, as aforesaid, it was true that all but one of the common carrier shipping lines regularly engaged in transportation of property in the outbound Far East trade were members of the aforesaid Far East Conference. That, accordingly, the answer of your petitioners admitted in Paragraph Nineteenth thereof, that the parties to the Far East Conference Agreement, at the time of the commencement of the suit, included all but one of the common carriers engaged with reasonable regularity in the transportation of property in the aforesaid trade, and in their affirmative defense, alleged in Paragraph Twenty-Eighth that only one common carrier not a party to the Far East Conference Agreement, was regularly operating in said trade and that such common carrier was believed by your petitioners to be the same party as that referred to in Paragraph 29 of the complaint.

3. That thereafter and in the month of October, 1949, other common carriers began operating regularly in the aforesaid trade. That said common carriers have since said date been dispatching, and are presently advertising further vessels for dispatch, in said outbound Far East trade at the rate of two or three vessels each month. That said common carriers have not applied for participation in the Far East Conference Agreement and are not parties to said agreement. That, therefore, the aforesaid allegations are no longer true.

[fol. 96] 4. That the circumstance of the institution of this service by these additional carriers is of the utmost materiality in this suit and that your petitioners therefore ask leave to allege said facts in a supplemental answer.

5. That the effect of the institution of such service by such

additional carriers is likewise of great materiality and should therefore likewise be alleged in the supplemental answer above referred to.

6. That your petitioners attached to their answer herein, marked Exhibit "1", a copy of the Far East Freight Agreement which they intended to bring into effect on December 1, 1948. That since the date of the filing of your petitioners' answer the said form of contract has become effective and is the form of Far East Freight Agreement presently in use. That your petitioners believe it essential that this further fact which has developed since the date of the joinder of issue, should be alleged in the supplemental answer.

7. That attached hereto and made a part hereof, marked Exhibit "A", is a copy of the supplemental answer which your petitioners ask leave to serve.

Wherefore, your petitioners respectfully pray that leave may be granted to them to serve and file a supplemental answer for the purpose of alleging matters of fact aforesaid.

Dated: Jersey City, N.J., January 3rd., 1950.

Milton, McNulty & Angelli, By John Milton, Member of the Firm, Solicitors for petitioners, Far East Conference, United States Lines Company, States Marine Corporation, M. V. Nonsuco Inc., Lancashire Shipping Co., Ltd., Skibsaktieselskapet Igadi, A. F. Klaveness & Co. A/S, The De La Rama Steamship Co., Inc., Waterman Steamship Corp. [fol. 97] ration, Prince Line, Ltd., Lykes Bros. Steamship Co., Inc., American President Lines, Ltd., Swedish East Asiatic Co., Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., Aktieselskapet Ivarans Rederi, Ellerman & Bucknall Steamship Co., Ltd., Fearnley & Eger, Wilhelmsens Dampskibsaktieselskab, Dampskibsselskabet Af 1912 A/S, The Bank Line, Ltd., The China Mutual Steam Navigation Co., Ltd., Silver Line, Ltd., The Ocean Steamship Company, Ltd., A/S Besco and A/S Dampskibsselskabet Svendborg, Office & P.O. Address, 1 Exchange Place, Jersey City, N.J.

I hereby certify that the foregoing is a True Copy of the original on file in my office. William H. Tallyn, Clerk, Per Minnie M. Spalletta, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

UNITED STATES OF AMERICA, Plaintiff,

v.

FAR EAST CONFERENCE, ET AL., Defendants

Supplemental Answer

Leave having been granted to them by this Honorable Court, the defendants, Far East Conference, United States Lines Company, States Marine Corporation, M. V. Nonsuco, Inc., Lancashire Shipping Co., Ltd., Skibsaktieselskapet Igadi, A. F. Klaveness & Co. A/S, The De La Rama Steamship Co., Inc., Waterman Steamship Corporation, Prince Line, Ltd., Lykes Bros. Steamship Co., Inc., American President Lines, Ltd., Swedish East Asiatic Co., Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., Aktieselskapet Ivarans Rederi, Ellerman & Bucknall Steamship Co., Ltd., Fearley & Eger, Wilhelmssens Dampskibsaktieselskab, Dampskibsselskabet Af 1912 A/S, The Bank Line, Ltd., The China Mutual Steam Navigation Co., Ltd., Silver Line, Ltd., The Ocean Steamship Company, Ltd., A/S Besco and A/S Dampskibsselskabet Svendborg, by their solicitors, Milton, McNulty & Angelli, further answering the complaint herein by this supplemental answer, allege:

One: Deny that the membership of the defendant, Far East Conference, includes all but one of the common carrier [fol. 99] shipping lines regularly engaged in the transportation of property in the outbound Far East trade, as alleged in the paragraph of the complaint numbered "29".

As and for a Supplement to the First Separate and Complete Defense Alleged in the Answer of the Above Named Defendants:

Two: Heretofore and in or about the month of October, 1949, certain common carriers (hereinafter collectively referred to as the "Additional Outside Carriers") which had

not theretofore regularly engaged in the transportation of property in the outbound Far East trade, instituted a new service as common carriers in said trade.

Three: Said Additional Outside Carriers have, since the institution of said service, conducted said service by sailings at the rate of two or three per month in said trade and are presently advertising future sailings at the same rate per month.

Four: Said Additional Outside Carriers have not applied to the parties to the Far East Conference Agreement for participation therein or for membership in the Far East Conference, and the Additional Outside Carriers are not parties to said Agreement or members of said Conference.

Five: On information and belief, said Additional Outside Carriers are, and since the institution of their service, have been carrying substantial quantities of cargo in the outbound Far East trade and said Second Outside Line continues to carry substantial quantities of cargo in said trade.

Six: On information and belief, the said Additional Outside Carriers have been enlisted to operate their vessels [fol. 100] in the outbound Far East trade by one corporation (hereinafter referred to as the "Agent") which is not a shipowner but which acts as Agent for the ship owners who from time to time, at the instance of the Agent, place their vessels on the berth for the carriage of cargo in the outbound Far East trade, and who, excepting for the berthing of their vessels as aforesaid, engage principally or exclusively in the ownership of vessels operated as tramps.

Seven: It is an economic factor in the competition among carriers of ocean-borne foreign commerce that anyone acting as agent for, or becoming the charterer of, tramp tonnage, can enter into immediate competition with existing carriers at times when attractive cargoes are offering, without making any capital investment whatsoever by way of plant, right of way or equipment; and, on information and belief, the Agent has instituted the service by said Additional Outside Carriers without the making of any capital investment for the purposes aforesaid or otherwise.

Eight: The volumes of cargoes offering for transportation in ocean-borne foreign commerce and particularly in the ocean-borne foreign commerce in the outbound Far

East trade, is, and historically has been, subject to the greatest fluctuations, with the result that at times there are cargoes sufficient to fill the holds of all ships available in the service at compensatory rates of freight, and at other times the cargoes offering are so meagre as to furnish only part cargoes for vessels even less in number than those regularly operated in the said trade by the parties to the Far East Conference Agreement.

[fol. 101] Nine: By reason of the premises, when the cargoes offering in the outbound Far East trade shall decrease, the Agent and the Additional Outside Carriers can withdraw from said trade without capital loss and without violation of any commitment or contract obligation to shippers; and at that time the parties to the Far East Conference Agreement will continue to operate while sustaining the losses incident to the contraction of cargoes and the decrease in freight rates which is caused by the decrease in the demand for space on ocean going vessels.

Ten: On information and belief, whereas the First Outside Line and the Second Outside Line are, and with the exception of a short period following the return of vessels to private operation in 1946 have been, fixing their rates for the carriage of all principal and most other commodities in the outbound Far East trade by deducting a fixed percentage from the rates shown in the filed tariffs for the time being in effect of the Far East Conference, the Additional Outside Carriers have, since the inception of their service, filed statements with the Maritime Commission, ship by ship, purporting to certify to the adherence by the said Additional Outside Carriers to current tariffs of the Far East Conference, with certain stated exceptions; but the said exceptions have included all or substantially all of the commodities which the Additional Outside Carriers have actually transported on the respective vessels in the outbound Far East trade; and as to said commodities so carried, the statements of exceptions filed by the Additional Outside Carriers have fixed freight rates substantially below the rates established by the current tariffs of the Far East Conference. Both the Second Outside Line and the Additional Outside Carriers are and have been paying to [fol. 102] brokers for the procurement of the cargoes of their principals, brokerages at rates far in excess of those permitted to be paid by members of the Far East Confer-

ence under the terms of the Far East Conference Agreement. The economic factors in the fixing of ocean freight rates in the foreign trades are such that, although steamship lines operating a minority of vessels can profitably operate at such reduced rates inasmuch as such rates attract full cargoes to them, nonetheless, if the parties to the Far East Conference Agreement should join the Second Outside Line and the Additional Outside Carriers in the reduction of said rates so that (on the assumption that, if the parties to the Far East Conference Agreement should so reduce their rates the Second Outside Line and the Additional Outside Carriers would not still further reduce their rates) all available cargoes would be borne ratably by all of the lines at such reduced rates, neither the members of said Conference nor said Second Outside Line nor said Additional Outside Carriers could earn compensatory freights or continue in profitable operation.

Eleven: On information and belief, the promulgation by the parties to the Far East Conference Agreement, acting pursuant to said Agreement, of tariffs providing for contract and non-contract rates, has not been restrictive of competition or monopolistic in tendency or in effect, in that said Second Outside Line has continued to remain in said outbound Far East trade and said Additional Outside Carriers have entered the same.

Twelve: On information and belief, by reason of the economic factors peculiarly applicable to ocean freight rate making and traffic, the said tariffs, so adopted by the parties to the Far East Conference Agreement, have had the effect of enabling the parties to the Far East Conference Agreement [fol. 103] went to retain a portion of the cargoes moving in the outbound Far East trade, which when freighted at the rates provided for in said tariffs, produced for the parties to said Far East Conference Agreement reasonably compensatory aggregate freights while at the same time permitting the Second Outside Line and the Additional Outside Carriers by using differentially lower rates in order to attract cargoes, likewise to earn compensatory aggregate freights.

Thirteen: On information and belief, in view of the entry into the trade as aforesaid by the said Additional Outside Carriers operating and fixing freight rates as aforesaid, a restraint upon the parties to the Far East Conference Agreement prohibiting them from pursuing the aforesaid

tariff practices under the terms of the Far East Conference Agreement would, as a matter of historically demonstrated ocean traffic and rate economics, have the effect of compelling the parties to the said Agreement to reduce their rates to meet the competition of the Second Outside Line and the Additional Outside Carriers who would in turn make further reductions. In the manner aforesaid, a rate war would ensue which would be monopolistic in its effects in that only the financially strongest of the lines engaged in the outbound Far East trade, whether parties to the Far East Conference Agreement or not, would survive, and financially weaker lines would be driven from the trade.

Fourteen: By reason of the premises, the tariff practices as aforesaid pursued under the Far East Conference Agreement by the parties thereto, are producing and, if permitted to continue undisturbed, will continue to produce stability of rates which is indispensable to enable American merchants, manufacturers and farmers to sell their products in the Far East market on customary business terms. On the other hand, a rate war would not only produce [fol. 104] the monopolistic effects among those conducting the transportation function to the Far East market, but would as well economically injure the commerce, industry and agriculture of the United States.

Fifteen: On December 1, 1948, the parties to the Far East Conference Agreement adopted the form of contract which is annexed to the answer of these defendants herein and marked Exhibit "1", as and for the uniform Far East Freight Agreement, and thereupon incorporated the same into, and the same became a part of, the tariff of the Far East Conference on file in the Office of Regulation, United States Maritime Commission, Washington, D. C., and said form of Agreement is and since December 1, 1948 has been the form of Far East Freight Agreement in use by the parties to the Far East Conference Agreement.

Dated: Jersey City, N. J., January 3, 1950.

Milton, McNulty & Angelli; by John Milton, Member of the Firm, Solicitors for the defendants other than Isthmian Steamship Company, Office & P. O. Address, 1 Exchange Place, Jersey City, N. J.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 105] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

MOTION AND NOTICE OF MOTION FOR LEAVE TO SERVE SUPPLEMENTAL ANSWER—Filed January 13, 1950

Upon the complaint and answer herein and upon the annexed petition of the Isthmian Steamship Company, one of the defendants herein, said defendant hereby moves for leave to serve a supplemental answer herein, setting forth transactions and occurrences which have happened since the date of the service of the answer herein hereby sought to be supplemented. A copy of such supplemental answer is attached to the annexed petition.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court in Courtroom No. 5, United States Post Office Building, Newark, New Jersey, on the 19th day of January, 1950, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: Newark, N. J., January 10th, 1950.

Stryker, Tams & Horner; by Josiah Stryker, Member of the Firm, Solicitors for Isthmian Steamship Company, one of the defendants, Office & P. O. Address, 744 Broad Street, Newark 2, New Jersey.

[fol. 106] To: James E. Kilday, Esq., Asst. to the Attorney General, and Joseph E. McDowell, Esq., Trial Attorney, and Herbert A. Bergson, Esq., Asst. Attorney General, Room 3119, Department of Justice, Washington, D. C.; Alfred E. Modarelli, Esq., U. S. Attorney, U. S. Post Office Building, Newark, N. J.; Milton, McNulty & Angelli, Esqs., Solicitors for defendants other than Isthmian Steamship Company, 1 Exchange Place, Jersey City, N. J.

[fol. 107] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

PETITION FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER—
Filed January 13, 1950

Now comes the Isthmian Steamship Company, one of the defendants above named, and petitions this Honorable Court for leave to file a supplemental answer, and respectfully shows:

1. That on or about August 6, 1948, the plaintiff above named filed its complaint against the above named defendants, alleging that certain acts on the part of the defendants constitute violations of Section 1 and Section 2 of the Act of July 2, 1890, as amended, known as the Sherman Anti-trust Act. That in the said complaint it was alleged that the defendants in this suit had entered into a conspiracy, and in Paragraph 34 of the complaint, it was alleged that the purpose and object of the conspiracy has been to drive out of and exclude from participation in the trade therein referred to as the "outbound Far East trade" and to eliminate from competition therein, steamship lines not parties to the alleged unlawful combination and conspiracy and thereby to achieve and maintain a monopoly of the transportation of cargo in said trade. That in Paragraph 29 of the complaint, it was alleged that the membership of the defendant, Far East Conference, includes all but one of [fol. 108] the common carrier shipping lines regularly engaged in transportation of property in said outbound Far East trade.

2. That thereafter and on or about October 4, 1948, your petitioner duly filed its answer to the aforesaid complaints. That at the time of the filing of the complaint, as aforesaid, and at the time of the filing of the answer, as aforesaid, it was true that all but one of the common carrier shipping lines regularly engaged in transportation of property in the outbound Far East trade were members of the aforesaid Far East Conference. That, accordingly, the answer of your petitioner admitted in Paragraph Twentieth

thereof, that the parties to the Far East Conference Agreement, at the time of the commencement of the suit, included all but one of the common carriers engaged with reasonable regularity in the transportation of property in the aforesaid trade, and in its affirmative defense, alleged in Paragraph Twenty-ninth that only one common carrier not a party to the Far East Conference Agreement, was regularly operating in said trade and that such common carrier was believed by your petitioner to be the same party as that referred to in Paragraph 29 of the complaint.

3. That thereafter and in the month of October, 1949, other common carriers began operating regularly in the aforesaid trade. That said common carriers have since said date been dispatching, and are presently advertising further vessels for dispatch, in said outbound Far East Trade at the rate of two or three vessels each month. That said common carriers have not applied for participation in the Far East Conference Agreement and are not parties to said agreement. That therefore, the aforesaid allegations are no longer true.

[fol. 109] 4. That the circumstance of the institution of this service by these additional carriers is material in this suit and that your petitioner therefore asks leave to allege said facts in a supplemental answer.

5. That the effect of the institution of such service by such additional carriers is likewise material and should therefore likewise be alleged in the supplemental answer above referred to.

6. That your petitioner attached to its answer herein, marked Exhibit "1", a copy of the Far East Freight Agreement which it intended to bring into effect on December 1, 1948. That since the date of the filing of your petitioner's answer the said form of contract has become effective and is the form of Far East Freight Agreement presently in use. That your petitioner believes it essential that this further fact which has developed since the date of the joinder of issue, should be alleged in the supplemental answer.

7. That attached hereto and made a part hereof, marked Exhibit "A", is a copy of the supplemental answer which your petitioner asks leave to serve.

Wherefore, your petitioner respectfully prays that leave may be granted to it to serve and file a supplemental answer for the purpose of alleging matters of fact aforesaid.

Dated: Newark, N. J., January 10th, 1950.

Stryker, Tams & Horner; by Josiah Stryker, Member, of the Firm, Solicitors for Petitioner, Isthmian Steamship Company, Office & P. O. Address, 744 Broad Street, Newark 2, New Jersey.

I hereby certify that the foregoing is a True Copy of the original on file in my office.

William H. Tallyn, Clerk; by Minnie M. Spalletta, Deputy.

[fol. 110]

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

UNITED STATES OF AMERICA, Plaintiff,

v.

FAR EAST CONFERENCE, ET AL., Defendants.

Supplemental Answer

Leave having been granted to it by this Honorable Court, the defendant, Isthmian Steamship Company, by its solicitors, Stryker, Tams & Horner, further answering the complaint herein by this supplemental answer, alleges:

One: Denies that the membership of the defendant, Far East Conference, includes all but one of the common carrier shipping lines regularly engaged in the transportation of property in the outbound Far East trade, as alleged in the paragraph of the complaint numbered "29".

As and for a Supplement to the First Separate and Complete Defense Alleged in the Answer of the Above Named Defendant:

Two: Heretofore and in or about the month of October, 1949, certain common carriers (hereinafter collectively re-

ferred to as the "Additional Outside Carriers") which had not theretofore regularly engaged in the transportation of property in the outbound Far East trade, instituted a new service as common carriers in said trade.

Three: Said Additional Outside Carriers have, since the institution of said service, conducted said service by sail- [fol. 111] ings at the rate of two or three per month in said trade and are presently advertising future sailings at the same rate per month.

Four: Said Additional Outside Carriers have not applied to the parties to the Far East Conference Agreement for participation therein or for membership in the Far East Conference, and the Additional Outside Carriers are not parties to said Agreement or members of said Conference.

Five: On information and belief, said Additional Outside Carriers are, and since the institution of their service, have been carrying substantial quantities of cargo in the outbound Far East trade and said Second Outside Line continues to carry substantial quantities of cargo in said trade.

Six: On information and belief, the said Additional Outside Carriers have been enlisted to operate their vessels in the outbound Far East trade by one corporation (hereinafter referred to as the "Agent") which is not a ship-owner but which acts as Agent for the ship owners who from time to time, at the instance of the Agent, place their vessels on the berth for the carriage of cargo in the outbound Far East trade, and who, excepting for the berthing of their vessels as aforesaid, engage principally or exclusively in the ownership of vessels operated as tramps.

Seven: It is an economic factor in the competition among carriers of ocean-borne foreign commerce that anyone acting as agent for, or becoming the charterer of, tramp tonnage, can enter into immediate competition with existing carriers at times when attractive cargoes are offering, without making any capital investment whatsoever by way of plant, right of way or equipment; and, on information and belief, the Agent has instituted the service by said Additional Outside Carriers without the making of any capital investment for the purposes aforesaid or otherwise.

Eight: The volumes of cargoes offering for transportation in ocean-borne foreign commerce and particularly in the ocean-borne foreign commerce in the outbound Far

East trade, is, and historically has been, subject to the greatest fluctuations, with the result that at times there are cargoes sufficient to fill the holds of all ships available in the service at compensatory rates of freight; and at other times the cargoes offering are so meagre as to furnish only part cargoes for vessels even less in number than those regularly operated in the said trade by the parties to the Far East Conference Agreement.

Nine: By reason of the premises, when the cargoes offering in the outbound Far East trade shall decrease, the Agent and the Additional Outside Carriers can withdraw from said trade without capital loss and without violation of any commitment or contract obligation to shippers; and at that time the parties to the Far East Conference Agreement will continue to operate while sustaining the losses incident to the contraction of cargoes and the decrease in freight rates which is caused by the decrease in the demand for space on ocean going vessels.

Ten: On information and belief, whereas the First Outside Line and the Second Outside Line are, and with the exception of a short period following the return of vessels to private operation in 1946 have been, fixing their rates for the carriage of all principal and most other commodities in the outbound Far East trade by deducting a fixed percentage from the rates shown in the filed tariffs for the time being in effect of the Far East Conference, the Additional Outside Carriers have, since the inception of their service, filed statements with the Maritime Commission, ship by ship, purporting to certify to the adherence by the said Additional Outside Carriers to current tariffs of the Far East Conference, with certain stated exceptions; but the said exceptions have included all or substantially all of the commodities which the Additional Outside Carriers have actually transported on the respective vessels in the outbound Far East trade; and as to said commodities so carried, the statements of exceptions filed by the Additional Outside Carriers have fixed freight rates substantially below the rates established by the current tariffs of the Far East Conference. Both the Second Outside Line and Additional Outside Carriers are and have been paying to brokers for the procurement of the cargoes of their principals, brokerages at rates far in excess of those permitted to be paid by members of the Far East Conference under the terms of the Far East Conference Agreement. The economic factors in the fixing of ocean freight rates in the foreign trades are,

such that, although steamship lines operating a minority of vessels can profitably operate at such reduced rates inasmuch as such rates attract full cargoes to them, nonetheless, if the parties to the Far East Conference Agreement should join the Second Outside Line and the Additional Outside Carriers in the reduction of said rates so that (on the assumption that, if the parties to the Far East Conference Agreement should so reduce their rates the Second Outside Line and the Additional Outside Carriers would not still further reduce their rates) all available cargoes would be borne ratably by all of the lines at such reduced [fol. 114] rates, neither the members of said Conference nor said Second Outside Line nor said Additional Outside Carriers could earn compensatory freights or continue in profitable operation.

Eleven: On information and belief, the promulgation by the parties to the Far East Conference Agreement, acting pursuant to said Agreement, of tariffs providing for contract and non-contract rates, has not been restrictive of competition or monopolistic in tendency or in effect, in that said Second Outside Line has continued to remain in said outbound Far East trade and said Additional Outside Carriers have entered the same.

Twelve: On information and belief, by reason of the economic factors peculiarly applicable to ocean freight rate making and traffic; the said tariffs, so adopted by the parties to the Far East Conference Agreement, have had the effect of enabling the parties to the Far East Conference Agreement to retain a portion of the cargoes moving in the outbound Far East trade, which when freighted at the rates provided for in said tariffs, produced for the parties to said Far East Conference Agreement reasonably compensatory aggregate freights while at the same time permitting the Second Outside Line and the Additional Outside Carriers by using differentially lower rates in order to attract cargoes, likewise to earn compensatory aggregate freights.

Thirteen: On information and belief, in view of the entry into the trade as aforesaid by the said Additional Outside Carriers operating and fixing freight rates as aforesaid, a restraint upon the parties to the Far East Conference Agreement prohibiting them from pursuing the afore-[fol. 114a] said tariff practices under the terms of the Far East Conference Agreement would, as a matter of historically demonstrated ocean traffic and rate economics, have

the effect of compelling the parties to the said Agreement to reduce their rates to meet the competition of the Second Outside Line and the Additional Outside Carriers who would in turn make further reductions. In the manner aforesaid, a rate war would ensue which would be monopolistic in its effects in that only the financially strongest of the lines engaged in the outbound Far East trade, whether parties to the Far East Conference Agreement or not, would survive, and financially weaker lines would be driven from the trade.

Fourteen: By reason of the premises, the tariff practices as aforesaid pursued under the Far East Conference Agreement by the parties thereto, are producing and, if permitted to continue undisturbed, will continue to produce stability of rates which is indispensable to enable American merchants, manufacturers and farmers to sell their products in the Far East market on customary business terms. On the other hand, a rate war would not only produce the monopolistic effects among those conducting the transportation function to the Far East market, but would as well economically injure the commerce, industry and agriculture of the United States.

Fifteenth: On December 1, 1948, the parties to the Far East Conference Agreement adopted the form of contract which is annexed to the answer of these defendants herein and marked Exhibit "1", as and for the uniform Far East Freight Agreement, and thereupon incorporated the same into, and the same became a part of, the tariff of the [fol. 115] Far East Conference on file in the Office of Regulation, United States Maritime Commission, Washington, D. C., and said form of Agreement is and since December 1, 1948 has been the form of Far East Freight Agreement in use by the parties to the Far East Conference Agreement.

Dated: Newark, N. J., January 10, 1950.

Stryker, Tams & Horner, by Josiah Stryker, Member of the Firm, Solicitors for Isthmian Steamship Company, one of the defendants, Office & P. O. Address, 744 Broad Street, Newark 2, New Jersey.

[fol. 116] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed December
16, 1949

The United States of America, plaintiff, by its attorneys, acting pursuant to Rule 12 of the Federal Rules of Civil Procedure, moves this court for a judgment on the pleadings in favor of the United States on the ground that the pleadings by the defendants on file in this action establish that there is no genuine issue as to any material fact, and that on the undisputed facts the United States is entitled as a matter of law to the judgment for which it moves herein.

Dated:

James E. Kilday, Special Assistant to the Attorney General; Joseph E. McDowell, Trial Attorney; Herbert A. Bergson, Assistant Attorney General; Alfred E. Modarelli, United States Attorney.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO INTERVENE—Filed January
9, 1950

To: Alfred E. Modarelli, U. S. Attorney, U. S. Post Office Building, Newark, N. J.

Joseph E. McDowell, Special Assistant to Attorney General, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

Milton, McNulty & Angelli, Solicitors for defendants herein other than Isthmian Steamship Company, Office & P. O. Address, 1 Exchange Place, Jersey City, N. J.

Stryker, Tams & Horner, Solicitors for defendant, Isthmian Steamship Company, Newark, N. J.

Please take notice that the undersigned will bring the attached motion on for hearing before this Court in Courtroom No. 5, United States Post Office Building, Newark, New Jersey, on the 9th day of January, 1950, at 10:30 o'clock, A. M., or as soon thereafter as Counsel can be heard.

December 29, 1949.

United States Maritime Commission. By: (S.) Paul D. Page, Jr., Solicitor. By: (S.) George F. Gal-land, Washington 25, D. C.

[fol. 118] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MOTION FOR LEAVE TO INTERVENE AS DEFENDANT

The United States Maritime Commission (hereinafter called "the Commission") moves, pursuant to Rule 24 (a) (2) and Rule 24 (b), Federal Rules of Civil Procedure, for leave to intervene as a defendant in this action in order to assert the defenses set forth in its proposed motion to dismiss the complaint, a copy of which is hereto annexed, the grounds of this motion being that (1) representation of the Commission's interest by existing parties is or may be inadequate and the Commission is or may be bound by the judgment in the action; (2) the Commission's defense and the main action have a question of law or fact in common; and (3) plaintiff in this action relies for ground of claim, and defendants rely for ground of defense upon provisions of the Shipping Act, 1916, as amended, which Act is administered by the Commission. Participation by the Commission as a party to this action will, it is believed, materially aid in the expeditious determination of the action and will in no way delay or prejudice the adjudication of the rights of the original parties.

December 29, 1949

United States Maritime Commission. By: (S.) Paul D. Page, Jr., Solicitor. By: (S.) George F. Gal-land, Washington 25, D. C.

[fol. 119] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

MOTION OF UNITED STATES MARITIME COMMISSION, DEFENDANT-INTERVENOR, TO DISMISS COMPLAINT—Filed January 9, 1950

The United States Maritime Commission, Defendant-Intervenor, moves pursuant to Rule 12 (b), Federal Rules of Civil Procedure, for an order dismissing the complaint herein upon the grounds that (1) this Court lacks jurisdiction over the subject matter of this action; and (2) the complaint fails to state a claim upon which relief can be granted. December 29, 1949.

United States Maritime Commission. By: (S.) Paul D. Page, Jr., Solicitor. By: (S.) George F. Galland, Washington 25, D. C.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 120] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

[Title omitted]

The defendants having moved this court on the 19th day of January, 1950, for leave to file supplemental answers, and there having been argument on the said motion on that date, and the said supplemental answers having been filed on that date but no order having been expressly made authorizing the filing of the said answers, application now being made by the defendants for an order nunc pro tunc approving and authorizing the filing of said supplemental answers on January 19th, 1950,

It is, on this 6th day of April, 1951

Ordered, that the filing by defendants on January 19th, 1950, of the above mentioned supplemental answers be and the same is hereby approved, and that said answers shall

be considered as though this order had been made on January 19th, 1950.

(S.) William F. Smith, U. S. D. J.

We hereby consent to the form of the above order.

(S.) James E. Kilday, Assistant to the Attorney General; (S.) H. G. Morison, Assistant Attorney General; (S.) Grover C. Richman, Jr., Acting U. S. [fol. 121] Attorney; Stryker, Tams & Horner, By (S.) Josiah Stryker, Member of the Firm, Solicitors for Isthmian Steamship Company, one of the defendants; Milton, McNulty & Angelli, By (S.) John Milton, Member of the Firm, Solicitors for defendants other than Isthmian Steamship Company; (S.) George Galland, Counsel for Federal Maritime Board.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 122] UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

[Title omitted]

ORDER OF SUBSTITUTION—February 13, 1951

Upon the annexed stipulation of the parties to this action, it is hereby,

Ordered that Federal Maritime Board be and it is hereby substituted in place of United States Maritime Commission as Defendant-Intervenor in this action.

William F. Smith, U. S. D. J.

February 13th, 1951.

[fol. 123] UNITED STATES DISTRICT COURT, DISTRICT OF NEW
JERSEY

[Title omitted]

STIPULATION

It appearing that pursuant to Reorganization Plan No. 21 of 1950 (15 F. R. 3178), the United States Maritime Commission was abolished and its functions, insofar as they relate to this action, transferred to Federal Maritime Board,

It is hereby stipulated by and between the undersigned, that Federal Maritime Board may be substituted as defendant-intervenor in this action in place of United States Maritime Commission.

Paul D. Page, Jr., Solicitor; George F. Galland, Attorneys for Federal Maritime Board. Gareth M. Neville, Attorney for Plaintiff; Milton, McNulty & Angelli, Attorneys for Defendants other than Isthmian Steamship Company. Stryker, Tams & Horner, Attorneys for Isthmian Steamship Company.

February —, 1951.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 124] UNITED STATES DISTRICT COURT, DISTRICT OF NEW
JERSEY

Civil No. 11546

UNITED STATES OF AMERICA, Plaintiff,

vs.

FAR EAST CONFERENCE, UNITED STATES LINES COMPANY,
et als., Defendants.

OPINION—January 18, 1951

SMITH, District Judge:

This is a civil action for injunctive relief under Section 4 of the Sherman Act, 15 U. S. C. A. 4. The defendants are the Far East Conference, a voluntary association of

common carriers by water engaged in foreign trade, and the members of the association. The complaint, following a common pattern, charges that the defendants are "engaged in an unlawful combination and conspiracy in restraint of trade and commerce of the United States with foreign nations in the transportation of property in the outbound Far East trade," in violation of Section 1 of the Act, 15 U. S. C. A. 1. The defendants, except the Isthmian Steamship Company, have filed a joint answer; the Isthmian Steamship Company has filed a separate answer.

The action is before the Court at this time on two motions: first, a motion for judgment on the pleadings, filed by the plaintiff pursuant to Rule 12(c) of the Federal Rules of [fol. 125] Civil Procedure, and second, a motion to dismiss the action, filed by the defendants pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. We shall restrict this opinion to a discussion of the questions raised by the latter motion, in support of which there are two grounds urged: the lack of jurisdiction in the court, and the failure of the complaint to state a claim upon which relief can be granted. It should be noted that a similar motion has been filed by the United States Maritime Commission,¹ hereinafter identified as the Commission, which has been granted leave to intervene.

The jurisdiction of this Court is defined with particularity by Section 4 of the Sherman Act, 15 U. S. C. A. 4, which provides: "The several district courts of the United States are invested with jurisdiction to PREVENT AND RESTRAIN violations of sections 1-7 of this title." (Emphasis by the Court.) It should be noted that this section not only vests the district courts with equity jurisdiction but also imposes upon "the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General," the duty "to institute proceedings in equity to prevent and restrain such violations." The language of the statute is free from ambiguity and there can be no doubt as to either the right of the United States to maintain suits under the anti-

¹The functions of the United States Maritime Commission have been transferred to the Federal Maritime Board pursuant to the provisions of the Reorganization Act of 1949 and Reorganization Plan No. 21 of 1950.

trust laws or the jurisdiction of this court to entertain them.

The defendants do not deny that the allegations of the complaint are sufficient to charge violations of Section 1 of the Sherman Act. They argue that notwithstanding the express provisions of Section 4 of the said Act, *supra*, the exclusive primary jurisdiction of the present controversy is in the Commission under the Shipping Act of [fol. 126] 1916, 46 U. S. C. A. 801-842. We cannot agree. The latter Act is a comprehensive measure which vests in the Commission plenary authority to regulate common carriers by water engaged in foreign commerce, but even this authority is subject to the limitations prescribed by the Act. The mere fact that the shipping industry is subject to governmental regulation does not wholly exempt those engaged in it from the provisions of the Sherman Act. *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439, 456; see also *United States Alkali Assn. v. United States*, 325 U. S. 196, 205, 206, *et seq.*; *United States v. Borden Co.*, 308 U. S. 188, 198, *et seq.*; *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156, 161, *et seq.*; *United States v. Pacific & Arctic Co.*, 228 U. S. 87, 102, 105. The only exemption is that which is granted by a specific provision of the Shipping Act, but even this exemption may not be construed as a restriction on the jurisdiction of this court.

It is further argued that the conduct of the defendants and the practices in which they are concertedly engaged, here alleged to be in violation of the antitrust laws, are exempt under Section 15 of the Shipping Act, 46 U. S. C. A. 814. (The pertinent provisions of the statute are quoted in the annexed appendix.) This argument is based upon the admitted fact that the "Conference Agreement," pursuant to which the Conference was organized and under which its members have adopted a uniform system of dual rates, was approved by the Commission's predecessor, the Shipping Board, and conforms to the requirements of the said section. We concede that the Conference Agreement, having been approved by the Shipping Board, may be within the purview of the statutory exemption, but it does not follow that all conduct of the defendants and the practices in which they may be concertedly engaged are exempt from the provisions of Section 1 of the Sherman Act. See the cases hereinabove cited.

The defendants apparently misconceive the scope of the exemption granted them by Section 15 of the Shipping Act. This section vests in the Commission a limited authority [fol. 127] to approve only certain agreements² to which COMMON CARRIERS by water, or other PERSONS SUBJECT TO THE ACT, are parties and combinations organized pursuant thereto, agreements and combinations which might otherwise be illegal under Section 1 of the Sherman Act. (Emphasis by the Court.) The exemption is coterminous with this limited authority and extends only to agreements lawful under the section. The exemption does not extend to other agreements and combinations not clearly within its purview, agreements and combinations which may violate Section 1 of the Sherman Act.

The defendants likewise misconceive the effect of the specific immunity granted by the statute. They construe the exemptive provision, read in the light of the other provisions of the section, as a limitation on the jurisdiction of the court. We cannot adopt this construction. The exemptive provision makes available to the defendants a legal defense not otherwise available, but it does not curtail the authority vested in this court by the specific provisions of Section 4 of the Sherman Act. *United States v. Borden Co.*, *supra*, 201. The provisions of the Shipping Act, considered in the light most favorable to the defendants may not be interpreted as an implied repeal *pro tanto* of the jurisdictional provisions of the Sherman Act. It is well established that repeals by implication are not favored. *United States Alkali Assn. v. United States*, *supra*, 209; *United States v. Borden Co.*, *supra*, 198, *et seq.*

The second ground urged in support of the motion, to wit, failure of the complaint to state a claim upon which relief can be granted, is predicated substantially on the arguments hereinabove discussed. The defendants challenge the right of the United States to maintain this action, and for the same reasons urged in support of their attack upon the jurisdiction of the court. These arguments are without merit. The right of the United States to maintain [fol. 128] this action, like the jurisdiction of this court,

² Agreements "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; etc." (See Appendix.)

is derived from Section 4 of the Sherman Act. The exemption granted by Section 15 of the Shipping Act may be interposed as a substantive defense but it may not be raised as a procedural bar to the right of the United States to prosecute this action.

It is urged, but not argued too strenuously, that the only remedy available to the United States is that accorded by the Shipping Act. We find no provision therein which grants to the United States either the right or the privilege to invoke the jurisdiction of the Commission. Section 22 of the Act, 46 U. S. C. A. 821, reserves to "any person" a right to file "a sworn complaint setting forth any violation of" the Act, "and asking reparation for the injury, if any, caused thereby." The term "person" as therein used "includes corporations, partnerships, and associations existing under or authorized by" law, but it does not include the United States. The term "person" does not "include the sovereign, and statutes employing it will ordinarily not be construed to do so." *United States v. United Mine Workers*, 330 U. S. 258, 275; see also *United States v. Cooper Corp.*, 312 U. S. 600, 604, *et seq.* We find nothing in the Act which may be interpreted as a grant of a right, especially to the United States, to seek injunctive relief in a proceeding before the Commission.

The arguments advanced by the defendants suggest an irreconcilable conflict of jurisdiction, but we find no such conflict. We must concede that the Shipping Act vests in the Commission the authority to regulate common carriers by water and the power to enjoin obedience to its orders and compliance with the statutory provisions. The Sherman Act, however, is equally comprehensive and vests in the district courts plenary jurisdiction to enforce its provisions by injunction, a power not vested in the Commission. We find no provision in either statute which may be construed as an explicit limitation on either the right of the United States to maintain this action or the jurisdiction of this court to entertain it.

[fol. 129] The defendants rely primarily on the case of *United States Navigation Co. v. Cunard Steamship Co., et al.*, 284 U. S. 474, a case which is distinguishable from the present action. Therein a common carrier by water, aggrieved by practices in which other carriers were concertedly engaged, brought suit for injunctive relief under Section 16 of the Clayton Act, 15 U. S. C. A. 26. The

complaint admittedly charged violations of Section 1 of the Sherman Act. The Supreme Court held: "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so inter-related with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." An examination of the case discloses that this conclusion was based upon the determination that the private litigant had not only an enforceable right under the Shipping Act but an adequate remedy; the right and the remedy are discussed by the Court at length on pages 483 and 484 of the opinion.

We find no provision in the Shipping Act which gives to the United States a similar right or remedy. We are informed by counsel for the Commission that the United States has been permitted to intervene in proceedings before the Commission, but even he does not suggest that this intervention was anything but permissive. It is our opinion that the provisions of the Sherman Act may be enforced by the United States only in the manner prescribed by that Act. There seems to be no other statutory remedy.

The motion to dismiss the complaint will be denied.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 130] MOTION FOR JUDGMENT ON THE PLEADINGS

The motion for judgment on the pleadings must be denied. It is our opinion that the present record will not support a determination that there is no genuine issue as to any of the material facts, a determination essential to the entry of judgment. The answers filed by the defendants raise issues of law and fact which should be decided only after a trial of the action on the merits. It is our opinion, however, that the case can be expeditiously tried on a stipulation of facts, and we recommend this procedure.

to the litigants. The parties may reserve the right to offer such evidence as may be necessary to complete the record thus made.

[fol. 131]

APPENDIX

Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be un-

lawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections, 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

[fol. 133] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 11546

UNITED STATES OF AMERICA, Plaintiff,

vs.

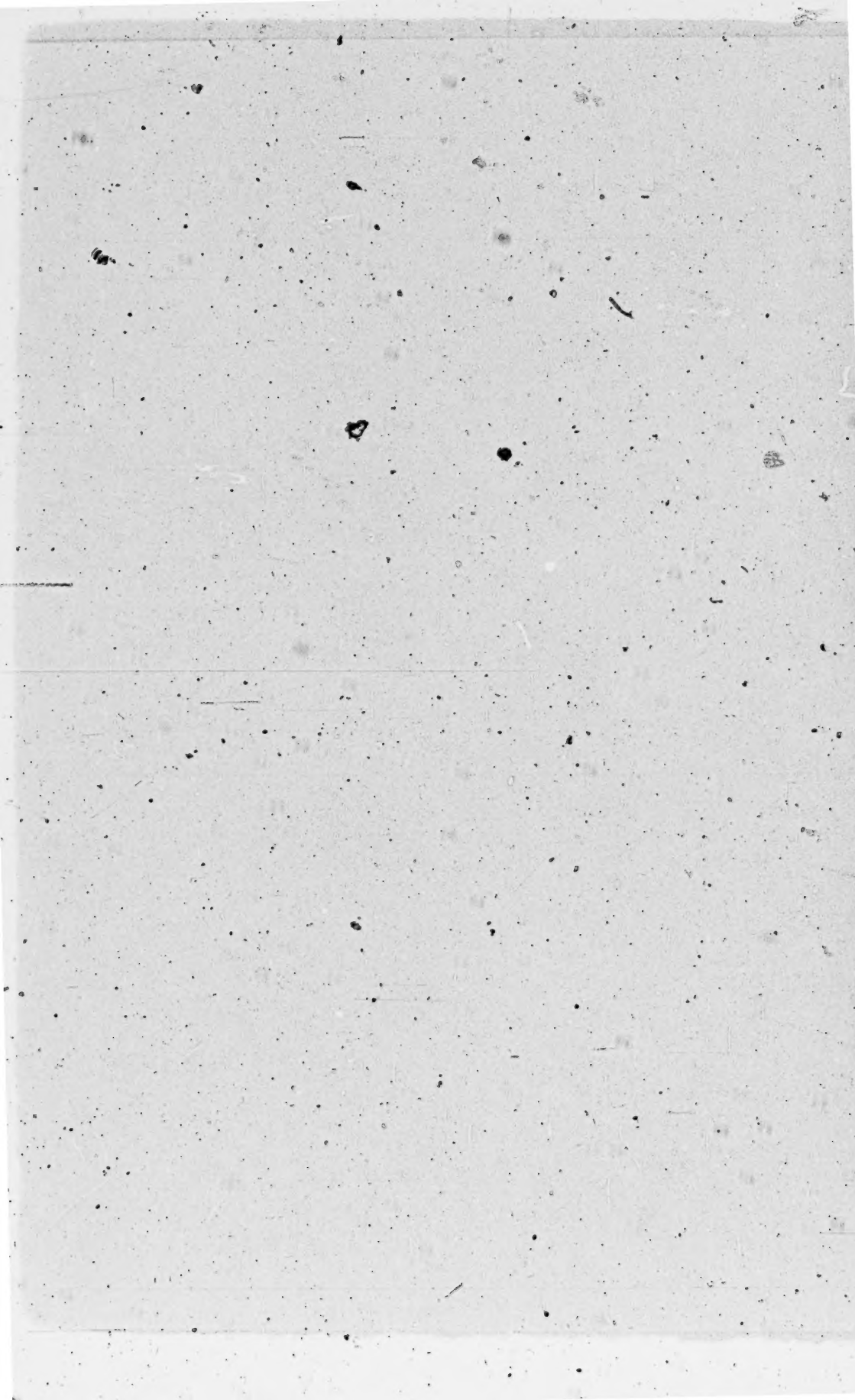
FAR EAST CONFERENCE, et al. Defendants.

ORDER—March 7, 1951

The parties herein, plaintiff, defendants, and intervenor, having respectively moved the court on the 19th day of January, 1950, as follows:

By plaintiff that judgment be entered in its favor on the pleadings theretofore filed, and by the defendants and intervenor (1) to dismiss the action upon the grounds that the court lacked jurisdiction over the subject matter, that the complaint fails to state facts upon which relief could be granted, that the complaint fails to state facts sufficient to show that the plaintiff has no remedy other than in equity, and that the alleged practices of defendants mentioned in the complaint are within the exclusive jurisdiction of the United States Maritime Commission under the Shipping Act as amended; or in the alternative (2) to stay and suspend all proceedings until

(a) Such time as United States Maritime Commission in an appropriate proceeding instituted therefor shall have investigated the acts, matters and charges alleged in the complaint and shall have made its decision and order with respect thereto pursuant to the primary jurisdiction thereunto vested in the United States Maritime Commission by law;



(b) Plaintiff shall have completely exhausted all administrative remedies in such case made and provided;

And the court having heard the argument of counsel and having read the briefs submitted in support thereof and being of opinion that all of the motions should be denied; [fol. 134] It is, on this 7th day of March, 1951,

Ordered, that all of the said motions by the plaintiff, defendants, and intervenor respectively, be and the same hereby are denied.

(S.) William F. Smith, U. S. D. J.

We hereby consent to the form of the above order.

(S.) James E. Kilday, Assistant to the Attorney General; (S.) H. Graham Morison, Assistant Attorney General; (S.) Grover C. Richman, Jr., Acting U. S. Attorney; Stryker, Tams & Horner, By (S.) Josiah Stryker, Member of the Firm, Solicitors for Isthmian Steamship Company, one of the defendants; Milton, McNulty & Augelli, By (S.) John Milton, Member of the Firm, Solicitors for defendants other than Isthmian Steamship Company; (S.) George F. Galland, Counsel for Federal Maritime Board.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 135] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO FILE PETITION FOR CERTIORARI AND GRANTING PETITION FOR CERTIORARI—October 8, 1951

On Consideration of the motion for leave to file a petition for writ of certiorari to the United States District Court for the District of New Jersey, it is ordered by this Court that the motion for leave to file a petition for writ of certiorari be, and it is hereby, granted. The petition for writ of certiorari is granted and the case is assigned for argument immediately following Nos. 134 and 135 *Rederi et al. vs. Isbrandsten Co., Inc., et al.*, and Federal Maritime Board vs. United States of America.

October 8, 1951.

Mr. Justice Clark took no part in the consideration or decision of this application.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

15 No. 539 MISC.

JUN 2 1951
CHARLES ELMORE CROPLEY
CLERK

**FAR EAST CONFERENCE, UNITED STATES LINES COMPANY,
STATES MARINE CORPORATION, M. V. NONSUCO INC., LANCA-
SHIRE SHIPPING CO., LTD., SKIBSAKTIESELSKAPET IGADI,
A. F. KLAVENESS & CO. A/S, THE DE LA RAMA STEAM-
SHIP CO., INC., WATERMAN STEAMSHIP CORPORATION,
PRINCE LINE, LTD., LYKES BROS. STEAMSHIP CO., INC.,
AMERICAN PRESIDENT LINES, LTD., SWEDISH EAST ASIATIC
CO., LTD., NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ
"OCEAAN". N. V., AKTIESELSKAPET IVARANS REDERI, ISTH-
MIAN STEAMSHIP COMPANY, ELLERMAN & BUCKNALL
STEAMSHIP CO., LTD., FEARNLEY & EGER, WILHELMSSENS
DAMPSKIBSAKTIESELSKAB, DAMPSKIBSSELSKABET AF 1912
A/S, THE BANK LINE, LTD., THE CHINA MUTUAL STEAM
NAVIGATION CO., LTD., SILVER LINE, LTD., THE OCEAN
STEAMSHIP COMPANY, LTD., A/S BESCO, A/S DAMP-
SKIBSSELSKABET SVENDBORG,**

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

and

FEDERAL MARITIME BOARD,

Intervenor-Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT
and
PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT
COURT OF THE UNITED STATES FOR THE
DISTRICT OF NEW JERSEY.

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and

ELKAN TURK,
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New York 5, N. Y.,

Counsel for Petitioners other than Isthmian Steamship Company:

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Counsel for Petitioner, Isthmian Steamship Company.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1951

No.

FAR EAST CONFERENCE, UNITED STATES LINES COMPANY,
STATES MARINE CORPORATION, M. V. NONSUCO INC., LANCA-
SHIRE SHIPPING CO., LTD., SKIBSAKTIESELSKAPET IGADI,
A. F. KLAVENESS & CO. A/S, THE DE LA RAMA STEAM-
SHIP CO., INC., WATERMAN STEAMSHIP CORPORATION,
PRINCE LINE, LTD., LYKES BROS. STEAMSHIP CO., INC.,
AMERICAN PRESIDENT LINES, LTD., SWEDISH EAST ASIATIC
CO., LTD., NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ
"OCEAAN" N. V., AKTIESELSKAPET IVARANS REDERI, ISTH-
MIAN STEAMSHIP COMPANY, ELLERMAN & BUCKNALL
STEAMSHIP CO., LTD., FEARNLEY & EGER, WILHELMSSENS
DAMPKIBSAKTIESELSKAB, DAMPSKIBSSELSKABET AF 1912
A/S, THE BANK LINE, LTD., THE CHINA MUTUAL STEAM
NAVIGATION CO., LTD., SILVER LINE, LTD., THE OCEAN
STEAMSHIP COMPANY, LTD., A/S BESCO, A/S DAMP-
SKIBSSELSKABET SVENDBORG,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

and

FEDERAL MARITIME BOARD,

Intervenor-Respondent.

**Motion for Leave to File Petition for Writ of
Certiorari.**

Now come John Milton and Elkan Turk, counsel
for petitioners other than the petitioner, Isthmian
Steamship Company, and Josiah Stryker, counsel for
petitioner, Isthmian Steamship Company, and respect-
fully move this Court for leave to file the petition for
writ of certiorari, hereto annexed, under Section

1651(a) of Title 28, United States Code (formerly Section 262, Judicial Code, 28 U. S. C. Sec. 377), directed to the District Court of the United States for the District of New Jersey, to review that part and so much of an order of that Court, entered March 7, 1951, more particularly described in the petition, as denied petitioners' motions to dismiss the complaint herein on the ground that the Court was without jurisdiction over the subject matter of this action and, alternatively, on the ground that, because of the provisions of the Shipping Act, 1916, as amended, no cause of action under the Sherman Act was alleged; and for such other and further relief as may be just and proper.

Dated: June 1, 1951.

JOHN MILTON,
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1 Exchange Place,
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and

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*Counsel for Petitioners other than
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744 Broad Street,
Newark 2, N. J.,

*Counsel for Petitioner,
Isthmian Steamship Company.*

IN THE
Supreme Court of the United States
OCTOBER TERM, 1951

No.

FAR EAST CONFERENCE, UNITED STATES LINES COMPANY,
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SKIBSSELSKABET SVENDBORG,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

and

FEDERAL MARITIME BOARD,

Intervenor-Respondent.

**Petition for Writ of Certiorari to the District Court
of the United States for the District of New Jersey.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioners, Far East Conference, United
States Lines Company, States Marine Corporation,

M. V. Nonsuco Inc., Lancashire Shipping Co., Ltd., Skibsaktieselskapet Igadi, A. F. Klaveness & Co. A/S, The De La Rama Steamship Co., Inc., Waterman Steamship Corporation, Prince Line, Ltd., Lykes Bros. Steamship Co., Inc., American President Lines, Ltd., Swedish East Asiatic Co., Ltd., Nederlandsche Stoomvaart Maatschappij "Oceaan" N. V., Aktieselskapet Ivarans Rederi, Isthmian Steamship Company, Ellerman & Bucknall Steamship Co., Ltd., Fearnley & Eger, Wilhelmsens Dampskibsaktieselskab, Dampskibsselskabet af 1912 A/S, The Bank Line, Ltd., The China Mutual Steam Navigation Co., Ltd., Silver Line, Ltd., The Ocean Steamship Company, Ltd., A/S Besco, A/S Dampskibsselskabet Svendborg, respectfully pray for a writ of certiorari to the District Court of the United States for the District of New Jersey, to review that part and so much of an order of that Court entered March 7, 1951 (R. 104), as denied petitioners' motions to dismiss the action on the ground that the Court was without jurisdiction of the subject matter thereof and, alternatively, on the ground that, because of the provisions of the Shipping Act, 1916, as amended, no cause of action under the Sherman Act was alleged. A certified transcript of the record in this case is furnished herewith, in accordance with Rule 38, Paragraph 1, of the Rules of this Court.

OPINION BELOW.

The opinion of the District Court, rendered on petitioners' motions above referred to is reported at 94 F. Supp. 900 (1951) (R. 97).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1651(a) of Title 28, U. S. Code (formerly Section 262 of the Judicial Code, 28 U. S. C. § 377) as enacted by Public Law 773, 80th Congress, 2d Session. Section 2 of the Expediting Act of February 11, 1903, as amended (15 U. S. C. § 29), confers upon this Court exclusive appellate jurisdiction of civil suits brought by the United States under the Sherman Act. Grant of the common law writ of certiorari, as authorized by Section 1651(a) of Title 28, U. S. Code, is sought in aid of such exclusive appellate jurisdiction. The following decisions, more fully discussed in the argument which follows, sustain the power and jurisdiction of this Court to review the order and judgment, review of which is hereby sought: *United States Alkali Export Assn. v. United States*, 325 U. S. 196 (1945); *De Beers Consolidated Mines v. United States*, 325 U. S. 212 (1945).

The grant of the writ under these unusual circumstances is respectfully sought (1) to correct a claimed excess of jurisdiction by the Court below and the application by that Court of the Sherman Act to a state of facts which is excluded from its purview by the Shipping Act; and (2) in furtherance of justice in a question of great public importance.

STATEMENT OF THE CASE.

The complaint alleges violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2, Appendix, p. 25), and invokes the jurisdiction of the Court under Section 4 of that Act (15 U. S. C. § 4, Appendix, p. 25) (R. 1). It alleges that the defendants include

all but one of the steamship lines which regularly operate from United States Atlantic and Gulf of Mexico ports to ports in the Far East (R. 4). It further alleges that the defendant lines are organized into a steamship conference, the defendant Far East Conference, pursuant to a written Conference Agreement which had in 1922, long prior to the institution of the suit, been filed with, and approved, pursuant to Section 15 of the Shipping Act, 1916, as amended (46 U. S. C. § 814, Appendix, p. 31), by the United States Shipping Board, a predecessor in authority of the Federal Maritime Board (R. 4).

The complaint charges that the defendant lines combined and conspired to establish and maintain a system of "contract rates" and higher "non-contract rates", the sole consideration for the enjoyment of the lower contract rates being the agreement of the shipper to patronize the members of the Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade (R. 5). A further charge is made that the defendant lines carry practically all of the commercial tonnage in that trade (R. 4).

The complaint alleges as a conclusion that the effect of the dual rate system is coercive upon shippers and has the effect of driving out of the Far East trade any competitor who is not a member of the Conference (R. 6). The further conclusion is alleged that the acts complained of have restrained and monopolized the trade of the United States with the foreign countries in the Far East (R. 6).

The petitioners duly filed their answers (R. 21, 46) and supplemental answers (R. 76, 85) in which they alleged the historical and economic facts which, in

their view, amply justify the maintenance of the dual rate system.

The plaintiff moved for judgment on the pleadings (R. 93). The petitioners thereupon made motions (R. 72, 74), simultaneously returnable, to dismiss the complaint on the ground, generally stated, that the District Court was without jurisdiction and that no cause of action under the Sherman Act was alleged.

The petitioners' motion was founded upon the contention that only violations of the Shipping Act were alleged concerning which the United States Maritime Commission had exclusive primary jurisdiction, subject only to direct court review, as provided by statute. That Commission, the predecessor of the Federal Maritime Board, intervened and joined in petitioners' motions.

The Court below denied all of these motions. Petitioners here, of course, seek review only of so much of the order as denied petitioners' motions to the extent above stated.

QUESTIONS PRESENTED.

The question presented is a novel and very narrow one. This Court, in *United States Navigation Co. v. Cunard Steamship Co.*, 284 U. S. 474 (1932), determined that in a similar case in which a private steamship company was the plaintiff, the District Court was without jurisdiction. The complaint in the *United States Navigation* case charged that the defendants there violated the antitrust laws by maintaining a system of "contract rates" and higher "non-contract rates", the former being available only to

those shippers who agreed to confine their shipments exclusively to the defendant lines. The complaint in the *United States Navigation* case also charged various other acts not here charged against the defendants. Whereas, however, the complaint in the case at bar alleges that the defendant steamship companies had filed and obtained approval of their Conference Agreement (complaint, Par. 29, and Exhibit A attached to complaint) (R. 4, 8), the complaint in the *United States Navigation* case did not allege that the agreement among the steamship companies there sued had been so filed or so approved. Hence, the case at bar would seem more imperatively to demand primary disposition by the Maritime Board than did the *United States Navigation* case.

The narrow question, then, is does a different rule apply because the United States rather than a private litigant is the plaintiff. The Court below answered this question in the affirmative. This precise question has never been answered by this Court.

Stated more formally, the question is whether the District Court had jurisdiction of the subject matter of the cause or, on the other hand, whether the administrative body created by the Shipping Act, 1916, as amended, had exclusive primary jurisdiction over such subject matter; and whether, in the light of the Shipping Act, any cause of action under the Sherman Act was alleged.

STATUTES INVOLVED.

The pertinent sections of the Sherman Act and of the Shipping Act, 1916, as amended, are set forth in Appendix hereto attached.

SPECIFICATIONS OF ERRORS TO BE URGED.

The District Court erred in denying the motions to dismiss the complaint, which motions were made upon the ground that the District Court had no jurisdiction of the subject matter of the action and that said subject matter was within the exclusive primary jurisdiction of the administrative body created by the Shipping Act, 1916, and the acts amendatory thereof; and upon the further ground that in view of the provisions of the Shipping Act no cause of action under the Sherman Act was alleged.

REASONS FOR GRANTING THE WRIT.

(a) *The Public Importance of the Questions Involved.*

The importance of this question to the public of the United States cannot be overemphasized. In a recent case before it (*Isbrandtsen Company, Inc. v. North Atlantic Continental Freight Conference*, 3 F. M. B. 235 [1950], order set aside but with no disapproval of the finding here referred to, *Isbrandtsen Company, Inc. v. United States*, S. D. N. Y., not yet reported), the Federal Maritime Board stated that its predecessors "since 1931 approved no fewer than thirty-two conference agreements, which provide either specifically or inferentially for the dual rate system—and of these agreements, twenty-four are now in effect and the respective conferences are making active use of the dual rate system".

Each of the conferences thus employing the dual rate system indulges in the practice which is here charged to be wrongful and which was also charged

against the defendants in the *U. S. Navigation* case. Each such conference serves a separate branch of the commerce of the United States. Of course, each of those conferences consists of a substantial number of individual steamship companies. In turn, each of these companies serves the transportation needs of large numbers of American exporters and importers. Contracts exist between the shippers or consignees and the steamship companies under which the "contract rates" are enjoyed. Uncertainty and suspense will overhang all of the branches of industry, commerce and transportation in all of the trades in which the dual rate system is in operation if the primary jurisdiction of the Board to determine the lawfulness or unlawfulness of the respective system may be invaded by the courts.

It is petitioners' position that under certain competitive conditions conferences cannot exist without employing the dual rate system. If, under such conditions, they should be precluded from employing that system, rate wars and madly fluctuating freight rates would result. It was one of the findings of the so-called Alexander Committee, which recommended the adoption of the Shipping Act, that such rate wars constitute an evil not alone to the steamship lines but as well to the exporters and importers who depend upon steamship service as their means of transportation (H. R. Doc. 805, 63d Cong., 2d Sess., 416-417 [1914]). Fluctuation of freight rates prevents the merchant from quoting C. I. F. prices for forward delivery. If he cannot quote such prices, he cannot compete with merchants in foreign countries whose laws do not preclude steamship companies from com-

bining in such manner as to assure stability of freight rates.

Petitioners submit that it is of the maximum importance that uniformity be established in the determination of the legality of the several dual rate systems. Uniformity can be secured only if there is a single tribunal which shall set the economic standards, and shall make the original findings, upon which questions of legality are predicated; otherwise, all engaged in our tremendous ocean-borne commerce, will be involved in uncertainty and doubt as to the standards which shall be applied to their conduct dependent upon the identity of the party who summons them to account.

(b) *Intervention of the Federal Maritime Board.*

The importance of this issue is accented by the intervention below of the United States Maritime Commission. In support of its petition for leave to intervene, the Commission filed a memorandum in which the following statement appeared:

"The Commission is in full agreement with the defendants that the offenses charged against them pertain to matters committed by law exclusively to the Commission's primary jurisdiction, which jurisdiction will be materially impaired, and, indeed, effectively frustrated if plaintiff is permitted to maintain this action."

This contest for jurisdiction between the Maritime Board and the courts cries out for final decisive determination at this stage of the litigation.

(c) *Summary of Grounds Upon Which the Writ Should Be Allowed.*

The petitioners respectfully urge the allowance of the writ (1) so as to avoid a lengthy and burdensome trial of this case before the District Court, when it may become necessary, later, to retry the same issues before the Federal Maritime Board in the event that this Court should ultimately determine that the District Court is without jurisdiction; (2) because the questions presented by this petition are most appropriate for determination at the threshold of the litigation; (3) because the questions arise in a field (that of international transportation and commerce) of which the importance is incalculable and permanent; (4) because steamship conferences will be confused in their plans and practices until it shall be known whether dual rate systems established by them are to be judged by a single standard set up by a board of experts, or whether they may be judged by standards as numerous as are the judicial districts in the United States, dependent upon whether the Department of Justice determines to sue and in what district a single conference member may be found who meets the Sherman Act jurisdictional requirements; and (5) because similar uncertainty will afflict the innumerable shippers who have made contracts with the numerous shipping conferences under which they enjoy the lower contract rate.

ARGUMENT.

(a) *This Is an Appropriate Case for the Allowance of the Writ of Certiorari.*

Petitioners recognize that they must here invoke the extraordinary power of this Court to grant common law writs of certiorari as authorized by Section 1651(a) of Title 28 of the United States Code.

That this is an appropriate case for the granting of such writ, is established by *United States Alkali Export Assn. v. United States*, 325 U. S. 196 (1945). There, as here, defendants in an antitrust suit had been defeated in the District Court on a motion to dismiss which had raised the contention that an administrative agency, rather than the courts, had jurisdiction. This Court said, at page 203:

"The questions now presented involve the propriety of the exercise, by the district court, of its equity jurisdiction, and an asserted conflict between its jurisdiction and that of an agency of Congress said to be charged with the duty of enforcing the antitrust laws in the circumstances of the present case. If petitioners' motion was well founded, its denial operated to thwart the asserted purpose of Congress to afford to export associations, which overstep the bounds of the granted immunity, opportunity, with the expert aid of the Trade Commission, to retrace their steps, without being subjected to the penalties of the law. Exercise of its jurisdiction by the district court would preclude the Commission from carrying out its asserted functions of investiga-

tion, recommendation and report before any suit by the United States. This would be more than the mere denial of the right of a suitor such as Congress must have contemplated would be corrected by recourse to the prescribed appeal procedure. It would be a frustration of the functions which Congress had directed the Commission to perform and of the policy which Congress presumably sought to effectuate by their performance.

“The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment. The case is analogous to those in which this Court has, by writs issued under § 262, reviewed the action of district courts, alleged to be in excess of their authority, by which they have foreclosed the adjudication of rights or the protection of interests committed to the jurisdiction of a state officer or tribunal * * * [citing cases].”

We also refer the Court to *De Beers Consolidated Mines v. United States*, 325 U. S. 212 (1945).

The newly enacted 28 U. S. C. § 1651(a) is, except for the omission of the provision relative to the writ of *scire facias*, expressive of the Congressional intent to codify the application of the common law writ of certiorari to such cases as the *Alkali* case and the *De Beers* case. Upon this point, we refer to the re-

viser's notes, H. R. Rep. No. 308, 80th Cong., 1st Sess., A 145 (1947), and H. R. Rep. No. 2646, 79th Cong., 2d Sess., A 139 (1946). The reviser's notes are of great persuasive force. *Ex parte Collett*, 337 U. S. 55, 68-69 (1949); *U. S. v. National City Lines*, 337 U. S. 78, 81 (1949).

(b) *The Rule in the United States Navigation Case Should Be Applicable Here.*

United States Navigation Co. v. Cunard Steamship Co., 284 U. S. 474 (1932), involved an antitrust injunction suit which presented a parallel to the case at bar in all respects except two. There, the plaintiff was a steamship line which competed with the conference; and, being a private litigant, perforce invoked Section 16 of the Clayton Act (15 U. S. C. § 26, Appendix, p. 26). Here, the plaintiff is the United States. There, the complaint did not allege that the conference agreement had been filed and approved under Section 15 of the Shipping Act. Here, the complaint annexes the Conference Agreement as an exhibit and alleges its approval in 1922 (R. 4, 8).

The gravamen of the complaint in the case at bar is the conduct of a dual rate system. That the maintenance of a dual rate system was the chief charge made in the *U. S. Navigation* complaint, amply appears from the following language of this Court at page 479:

"The conspiracy involves the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents. The differentials thus created be-

tween the two rates are not predicated upon volume of traffic or frequency or regularity of shipment, but are purely arbitrary and wholly disproportionate to any difference in service rendered, the sole consideration being their effect as a coercive measure."

After reciting the pertinent provisions of the Shipping Act, this Court stated at page 485:

"A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare *Keogh v. Chicago & N. W. Ry. Co.*, *supra*, at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board."

The Court considered the unique nature of the business of ocean transportation and with regard thereto said at page 485:

"The [Shipping] act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement

among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal."

It is the position of the petitioners that the expertise of the Maritime Board is as essential when the United States, represented by the Department of Justice, is the complaining party, as when a private suitor seeks similar relief. Reason requires that the tribunal which presides in the one case should be as specialized and expert as the one which presides in the other. The demands of logic in this respect are fortified by the pertinent statutes appropriately construed.

The Court below attempted to distinguish the *United States Navigation* case from the case at bar on the ground that in this case the Government is the plaintiff and that the Shipping Act contains no provision permitting the Government to prosecute a complaint before the Maritime Board, while a private litigant has this right.

We respectfully submit that the Court below misunderstood the great purpose of the Shipping Act. Here, for the first time, the Congress legalized shipping conferences. To assure, however, that the public should have the benefits thereof and not suffer any of their possible abuses, the Congress set over the ship-

ping industry a new agency which, by continuous supervision, would stand as the protector of the public interest.

It is the duty of the Maritime Board to determine whether or not an existing practice is or is not lawful and in the public interest, as prescribed by the Act, and to apply the remedies therein provided with respect to any practice found by it to be unlawful. In deciding this question, it is the duty of the Board to consider the exceptional character of the foreign shipping business, the competitive conditions under which it operates, and all other relevant circumstances, and to apply its expert knowledge of the business in reaching a conclusion. The Board, as an agency of the United States, has full power to institute, on its own motion, any proceeding for the violation of the Act and, except as to orders for the payment of money, may in such a proceeding enforce the Act to the same extent as if it were determining an adversary proceeding (Shipping Act, § 22, 46 U. S. C. § 821, Appendix, p. 34).

Under Section 29 of the Shipping Act (46 U. S. C. § 828, Appendix, p. 38), the Attorney General is given specific power and authority to apply to the District Courts for the enforcement of any order thus entered by the Board. Sections 14, 15 and 32 of the Act (46 U. S. C. §§ 812, 814, 831, Appendix, pp. 28, 31, 40) provide both civil and criminal penalties in case of the violation of any of its prohibitions. The purpose of the Act, which is permissive as well as restrictive, could not be accomplished unless the Maritime Board has exclusive primary jurisdiction. We, therefore, believe that it is immaterial whether a proceeding under the Act may be instituted before the

Board by the Attorney General, or whether the sole power initially to enforce the provisions of the Act is vested in the Maritime Board.

Notwithstanding, however, that the Congress appointed the Maritime Board as the prime guardian of the public interest in such matters, it is, nonetheless, our contention that the United States, when represented by the Attorney General, may also set in motion the quasi judicial functions of the Board. The term "person" as used in the Act is broad enough to include a body politic. *California v. United States*, 320 U. S. 577 (1944).

The criterion enunciated by this Court in *United States v. Cooper Corp.*, 312 U. S. 600 (1941), i. e., which interpretation of the term "person" would the better accomplish the Congressional purpose, when applied to the provisions of the Shipping Act and in the light of its legislative history, compels the conclusion that the United States is a person who may prosecute a proceeding before the Maritime Board. These matters we shall be prepared to elaborate if the Court shall see fit to allow our petition.

(c) *No Prior Decision of This Court Requires an Adverse Determination of the Question.*

This Court has never held broadly that the rule of the *United States Navigation* case is not applicable to an antitrust suit instituted by the Department of Justice. The cases relied upon below, which will undoubtedly be cited here, constitute authority for no such proposition.

United States v. Borden Co., 308 U. S. 188 (1939).

In the *Borden* case, the indictment was found not only against dairy farmers and distributors of milk, who were subject to the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. §§ 671-674) and its predecessor acts, and the Capper-Volstead Act (7 U. S. C. §§ 291-292), but as well against leaders of a truck drivers union and officials of the City of Chicago, charging a conspiracy to fix prices. The indictment was attacked upon the ground that primary jurisdiction was vested in the Secretary of Agriculture.

It at once appears that the parties to the conspiracy transcended the classification of persons who were subject to regulation by the Secretary of Agriculture, *i. e.*, they included union leaders and city officials. That this Court gave controlling effect to this distinction, in disposing of the defendant's motion under the Capper-Volstead Act, amply appears from its language at pages 204 and 205.

The Agricultural Marketing Agreement Act validated certain agreements among parties engaged in the dairy industry, as Section 15 of the Shipping Act validates certain agreements among common carriers by water. However, the former Act did not condemn as illegal agreements which did not conform to the standards of the Act, as the Shipping Act condemns as illegal agreements which do not meet its standards. With respect to the former Act, if illegality were to be charged, it must of necessity be charged under the Sherman Act. That this Court gave effect to this distinction appears from the language of this Court at pages 199-200. Moreover, the Court found in the *Borden* case that such of the defendants as were subject to the Act had not complied with its provisions.

United States Alkali Export Assn. v. United States, 325 U. S. 196 (1945).

The *Alkali* case was an antitrust suit against members of an Export Trade Association organized under the Webb-Pomerene Act (15 U. S. C. §§ 61-65). The defendants there moved to dismiss on the ground, among others, that primary jurisdiction lay in the Federal Trade Commission. This Court rejected that contention on two grounds: First, that the Webb-Pomerene Act did not vest in the Federal Trade Commission the power to adjudicate any controversies, and, second, that the acts charged were not declared by the Webb-Pomerene Act itself to be illegal.

As to the first point, the Commission's power was merely to investigate and report. This point was stressed by this Court at page 206:

"But while it [the Webb-Pomerene Act] empowers the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations."

The gist of this Court's opinion on the second point is found in the following sentence at page 208:

"Further, there is no want of specific authority for the United States to enforce the antitrust laws; the violations here alleged are not violations of the Webb-Pomerene Act but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States."

(d) *This Court, in Principle, Has Ruled in a Manner Favorable to Our Position.*

In *United States v. Pacific and Arctic Navigation Co.*, 228 U. S. 87 (1913), steamship lines running from United States to Alaska, a wharf company in Alaska and railroad companies, some of which had their rights of way in Alaska and others of which traversed Canadian territory, were indicted.

The Court below sustained a demurrer to all the counts of the indictment on the ground that the Interstate Commerce Commission had primary jurisdiction over all of the acts charged therein.

Counts 1 and 2 of the indictment charged a conspiracy to fix rates for transportation in violation of the Sherman Act. This Court held that the Interstate Commerce Commission had no power or jurisdiction with respect to such a conspiracy and reversed the judgment of the District Court with respect to counts 1 and 2. This decision, of course, was rendered prior to the enactment of the Reed-Bulwinkle Act (49 U. S. C., § 5 b) and was quite in accord with the prior decisions of this Court in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897), and *United States v. Joint Traffic Association*, 171 U. S. 505 (1898). This portion of the Court's decision is, therefore, no authority for the conclusion reached below.

Counts 3, 4 and 5 of the indictment charged unlawful and unjust discrimination in violation of the Interstate Commerce Act against the Humboldt Steamship Com-

pany, in connection with the transportation of passengers and freight. This Court affirmed the judgment of the District Court in sustaining a demurrer to these counts, holding that the subject matter thereof was within the exclusive primary jurisdiction of the Interstate Commerce Commission. In affirming the judgment of the District Court as to counts 3, 4 and 5, this Court said at pages 107-108:

“The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to wit: *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, *supra*. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal

to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

Attention is drawn to the fact that this Court applied the rule of *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 427 (1907), and *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, 215 U. S. 481 (1910), both of which were cases between private litigants, to the *Pacific and Arctic* case in which the Government, represented by the Attorney General, was the prosecutor. This decision strongly supports petitioners' contention that the application of the doctrine of primary administrative jurisdiction does not depend upon whether the Government or private litigants are involved.

In the case at bar, as pointed out in the *United States Navigation* case, the acts complained of fall within the regulatory and administrative power of the Maritime Board under the Shipping Act. The provisions of that Act are enforceable with respect thereto by the Maritime Board.

(c) *The Dual Rate System Is Not Illegal Per Se.*

Our petition may be opposed by the argument, also advanced below, that the dual rate system is illegal *per se* under the Shipping Act and, hence, that there is no material upon which the Board may exercise its expertise.

This proposition was disposed of by this Court in the *United States Navigation* case. There, too, the argument of illegality *per se* was made. This Court's answer was stated as follows, at page 487:

"And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

The same question was considered by this Court in *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297 (1937). The comments of the Court with respect thereto appear in the footnote at page 307.

We do not here cite the line of decisions by the Maritime Board and its predecessors in which over the years some contract systems have been upheld and others held bad unless modified in accordance with specified directions.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

June 1, 1951.

Respectfully submitted,

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APPENDIX.

A. Selected provisions of the Sherman Act. (extracted from Title 15, U. S. C. A.).

Sec. 1. (15 U. S. C. sec. 1.) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. (15 U. S. C. sec. 2.) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * *

Sec. 4. (15 U. S. C. sec. 4.) The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the di-

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rection of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

B. Selected provision of the Clayton Act (extracted from Title 15, U. S. C. A.).

Sec. 16. (15 U. S. C. sec. 26.) Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue: *Provided*, That nothing contained in sections 12,

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13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

C. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U. S. C. A.).

Sec. 1. (46 U. S. C. sec. 801.) When used in this chapter: The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce".

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

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The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

Sec. 14. (46 U. S. C. sec. 812.) No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter [Act] means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any

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other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter [Act] means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

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Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$25,000 for each offense.

Sec. 14a. (46 U. S. C. sec. 813.) The commission [board] upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 812 of this title; or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves, in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the commission [board] determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the commission [board] shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the

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United States, or any Territory, District, or possession thereof, until the commission certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

Sec. 15. (46 U. S. C. sec. 814.) Every common carrier by water, or other person subject to this chapter [Act], shall file immediately with the commission [board] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission [board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or

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between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [board] shall be lawful until disapproved by the commission [board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [board].

All agreements, modifications, or cancellations made after the organization of the commission [board] shall be lawful only when and as long as approved by the commission [board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Sec. 16. (46 U. S. C. sec. 815.) It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false

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billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this chapter [Act], either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter [Act].

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Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense.

Sec. 17. (46 U. S. C. sec. 816.) No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission [board] finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter [Act] shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the commission [board] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Sec. 22. (46 U. S. C. sec. 821.) Any person may file with the commission [board] a sworn complaint setting forth any violation of this chapter [Act] by a common carrier by water,

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or other person subject to this chapter [Act], and asking reparation for the injury, if any, caused thereby. The commission [board], shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission [board] satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission [board] shall, except as otherwise provided in this chapter [Act], investigate it in such manner and by such means, and make such order as it deems proper. The commission [board], if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The commission [board], upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter [Act].

Sec. 23. (46. U. S. C. sec. 822.) Orders of the commission [board] relating to any violation of this chapter [Act] shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission [Federal Maritime Board], other than for the payment of money, made under this chapter [Act], as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the com-

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mission [board], or be suspended or set aside by a court of competent jurisdiction.

Sec. 24. (46 U. S. C. sec. 823.) The commission [board] shall enter of record a written report of every investigation made under this chapter [Act] in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The commission [board] may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports, in all courts of the United States and of the States, Territories, District, and possessions thereof.

Sec. 25. (46 U. S. C. sec. 824.) The commission [board] may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the commission [board], operate as a stay of such order.

Sec. 26. (46 U. S. C. sec. 825.) The commission [board] shall have power, and it shall be its duty whenever complaint shall be made to it, to investigate the action of any foreign government with respect to the privileges afforded and burdens imposed upon vessels of the United

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States engaged in foreign trade whenever it shall appear that the laws, regulations, or practices of any foreign government operate in such a manner that vessels of the United States are not accorded equal privileges in foreign trade with vessels of such foreign countries or vessels of other foreign countries, either in trade to or from the ports of such foreign country or in respect of the passage or transportation through such foreign country of passengers or goods intended for shipment or transportation in such vessels of the United States, either to or from ports of such foreign country or to or from ports of other foreign countries. It shall be the duty of the commission [board] to report the results of its investigation to the President with its recommendations and the President is authorized and empowered to secure by diplomatic action equal privileges for vessels of the United States engaged in such foreign trade. And if by such diplomatic action the President shall be unable to secure such equal privileges then the President shall advise Congress as to the facts and his conclusions by special message, if deemed important in the public interest, in order that proper action may be taken thereon.

Sec. 27. (46 U. S. C. sec. 826.) For the purpose of investigating alleged violations of this chapter [Act], the commission [board] may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any member of the

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commission [board], and oaths or affirmations may be administered, witnesses examined, and evidence received by any member or examiner, or, under the direction of the commission [board], by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting under the direction of the commission [board] and witnesses shall, unless employees of the commission [board], be entitled to the same fees and mileage as in the courts of the United States. Obedience to any such subpoena shall, on application by the commission [board], be enforced as are orders of the commission [board] other than for the payment of money.

Sec. 28. (46 U. S. C. sec. 827.) No person shall be excused on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the commission [board] or of any court in any proceeding based upon or growing out of any alleged violation of this chapter [Act]; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 29. (46 U. S. C. sec. 828.) In case of violation of any order of the commission [board],

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other than an order for the payment of money, the commission [board], or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Sec. 30. (46 U. S. C. sec. 829.) In case of violation of any order of the commission [board] for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed; or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the commission in the premises.

In the district court the findings and order of the commission [board] shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs of any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

Appendix.

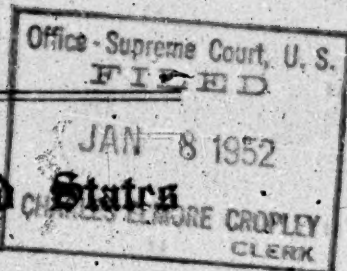
All parties in whose favor the commission [board] has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

Sec. 31. (46 U. S. C. sec. 830.) The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission [board], shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

Sec. 32. (46 U. S. C. sec. 831.) Whoever violates any provision of this chapter [Act], except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed \$5,000.

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SUPREME COURT, U. S.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1951
No. 15 Miscellaneous.

FAR EAST CONFERENCE, UNITED STATES LINES COMPANY,
STATES MARINE CORPORATION, M. V. NONSUCO INC., LANCA-
SHIRE SHIPPING CO., LTD., SKIBSAKTIESELSKAPET IGADI,
A. F. KLAVENESS & CO. A/S, THE DE LA RAMA STEAM-
SHIP CO., INC., WATERMAN STEAMSHIP CORPORATION,
PRINCE LINE, LTD., LYKES BROS. STEAMSHIP CO., INC.,
AMERICAN PRESIDENT LINES, LTD., SWEDISH EAST ASIATIC
CO., LTD., NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ
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MIAN STEAMSHIP COMPANY, ELLERMAN & BUCKNALL
STEAMSHIP CO., LTD., FEARNLEY & EGER, WILHELMSSENS
DAMPSKIBSAKTIESELSKAB, DAMPSKIBSSELSKABET AF 1912
A/S, THE BANK LINE, LTD., THE CHINA MUTUAL STEAM
NAVIGATION CO., LTD., SILVER LINE, LTD., THE OCEAN
STEAMSHIP COMPANY, LTD., A/S BESCO, A/S DAMP-
SKIBSSELSKABET SVENDBORG,

Petitioners,

UNITED STATES OF AMERICA,

Respondent,

and

FEDERAL MARITIME BOARD,

Intervenor-Respondent.

ON WRIT OF CERTIORARI UNDER 28 U. S. C. SECTION 1651 TO THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

**BRIEF OF PETITIONERS OTHER THAN
ISTHMIAN STEAMSHIP COMPANY.**

ELKAN TURK,
JOHN MILTON,
*Counsel for Petitioners other than
Isthmian Steamship Company.*

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UNITED STATES OF AMERICA,

Respondent,

and

FEDERAL MARITIME BOARD,

Intervenor-Respondent.

ON WRIT OF CERTIORARI UNDER 28 U. S. C. SECTION 1651 TO THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

**BRIEF OF PETITIONERS OTHER THAN
ISTHMIAN STEAMSHIP COMPANY.**

Opinion Below.

The opinion of the District Court (R. 97) is re-
ported at 94 F. Supp. 900 (1951).

Jurisdiction.

The order of the District Court was entered on March 7, 1951 (R. 104). The motion for leave to file the petition for writ of certiorari and the petition for the writ of certiorari were filed June 2, 1951. The motion for leave to file the petition for writ of certiorari and the petition for the writ of certiorari were granted on October 8, 1951, 342 U. S. 811 (R. 105).

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1651(a), as enacted by Public Law 773, 80th Congress, 2d Session, on the ground that Section 2 of the Expediting Act of February 11, 1903, as amended (15 U. S. C. § 29)¹ confers upon this Court exclusive appellate jurisdiction of civil suits brought by the United States under the Sherman Act, and that the grant of the common law writ of certiorari would be in aid of such exclusive appellate jurisdiction.

Questions Presented.

The complaint invokes the jurisdiction of the District Court under Section 4 of the Sherman Act (15 U. S. C. § 4) (R. 1). It alleges that the petitioner steamship lines, associated together in the petitioner, Far East Conference, pursuant to an agreement approved in 1922 under the provisions of the Shipping Act, 1916, as amended, constituted all but one of the common carrier lines regularly engaged in transportation of property in a trade described in the complaint as the outbound Far East trade (R. 4-5).

The complaint alleges that the petitioners violated Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2) by entering into a combination and con-

¹ Generally, statutes are cited only to the United States Code in the text of this brief. The corresponding citation to the Statutes at Large in all cases appear in the foregoing table of citations.

spiracy consisting of "a continuing agreement and concert of action among the defendants to control the transportation of all cargo in the outbound Far East trade by establishing and maintaining a system of 'contract rates' and higher 'non-contract rates,' the sole consideration for the enjoyment of the lower 'contract rates' being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade."

The questions are:

Whether any violation of law so charged does not constitute a violation of the Shipping Act rather than of the Sherman Act.

Whether the District Court had jurisdiction of the subject matter of the cause, or, on the other hand, whether the Federal Maritime Board² had exclusive primary jurisdiction over such subject matter.

Whether, in the light of the Shipping Act, the complaint states a claim under the Sherman Act upon which relief can be granted.

Whether the Board, acting under the provisions of

² The United States Shipping Board was the agency which was established by § 3 of the Shipping Act, 39 Stat. 729, and which was charged with the administration of that Act. Subsequently, by Executive Order June 10, 1933, No. 6166, § 12; (set out in note under 5 U. S. C. A. § 132) the United States Shipping Board was abolished and its functions were transferred to the Department of Commerce. Thereafter, by Act of June 29, 1936, 49 Stat. 1935, the United States Maritime Commission was created and the functions of administering the Shipping Act were transferred to it. Finally, the functions of the United States Maritime Commission have been transferred to the Federal Maritime Board, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203-207, 5 U. S. C. §§ 133(z) to 133(z)-15 and Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U. S. C. A. following § 133(z)-15. The Federal Maritime Board and its predecessors are referred to in this brief as "the Board".

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the Shipping Act was authorized to approve the Conference agreement among the petitioners.

The Pertinent Statutes Involved.

The pertinent sections of the Sherman Act and of the Shipping Act and Section 16 of the Clayton Act, are set forth in Appendix A, hereto attached.

Statement.

(a) Order under review.

This proceeding brings before the Court for review so much of an order of the District Court as denied the motion of the defendants (petitioners) to dismiss the complaint on the ground that it does not allege facts sufficient to state a claim under the Sherman Act and on the further ground that the Court has no jurisdiction over the subject matter.

(b) The complaint.

The complaint predicates the jurisdiction of the District Court solely upon Section 4 of the Sherman Act "in order to prevent and restrain continuing violations by them [the defendants], jointly and severally, as hereinafter alleged, of Sections 1 and 2 of said Act" (Complaint, Par. 1; R. 1).

The complaint alleges that the corporate defendants are engaged as common carriers by water in the transportation of property in the trade from Atlantic Coast and Gulf of Mexico ports of the United States to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippines. This trade is referred to in the complaint as the "outbound Far East trade" (Complaint, Par. 29; R. 4), a designation which is so apt that we adopt it for the purposes of this brief.

The complaint alleges that the corporate defendants are associated together in the defendant, Far East Conference, under an agreement known as United States Maritime Commission Conference Agreement No. 17, approved on November 14, 1922, under the provisions of Section 15 of the Shipping Act (Complaint, Par. 29; R. 4-5). This agreement between the corporate defendants, as from time to time amended, we shall refer to as the "Far East Conference Agreement." A copy of the Far East Conference Agreement constitutes Exhibit "A" attached to the complaint (R. 8).

Thereupon follow allegations that the membership of the Far East Conference includes all but one of the common carrier shipping lines regularly engaged in the outbound Far East trade, and that the members of the Far East Conference carry "virtually all" of the commercial tonnage transported in that trade (Complaint, Par. 29; R. 5).

After alleging in general terms an unlawful combination and conspiracy in restraint of trade and to create a monopoly in the transportation of property in the outbound Far East trade (Complaint, Par. 31; R. 5), the complaint then states the gist of the charge against these defendants. It states that the combination and conspiracy consist of "a continuing agreement and concert of action among the defendants to control the transportation of all cargo in the outbound Far East trade by establishing and maintaining a system of 'contract rates' and higher 'non-contract rates,' the sole consideration for the enjoyment of the lower 'contract rates' being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade." (Complaint, Par. 32; R. 5-6).

The complaint proceeds to allege that by the combined economic power of the defendants, ex-

erted through "coercive" rate differentials, the defendants have, pursuant to the combination and conspiracy, "induced and compelled" shippers in the outbound Far East trade to enter into freight agreements obliging the shippers to ship by the vessels of the members of the Conference exclusively and have enforced the obligation "by threatening the withdrawal of 'contract rates' and the imposition of oppressive fines and penalties for any deviation by such shippers from the terms of said agreement" (Complaint, Par. 33; R. 6). A copy of the Far East Trade Agreement as in effect on August 15, 1945, is attached to the complaint and marked Exhibit "B" (Complaint, Par. 33; R. 16).

The complaint alleges that the purpose and object of the combination and conspiracy is to drive out and exclude from participation in the outbound Far East trade and to eliminate from competition in that trade any carriers not parties to the combination and conspiracy and thereby to achieve and maintain a monopoly of the transportation of cargo in the trade (Complaint, Par. 34; R. 6).

It further charges (Complaint, Par. 35; R. 6) that, through the exclusive patronage contracts and "the threat of oppressive fines and penalties for deviation therefrom", the defendants have eliminated competition in the outbound Far East trade and have thereby unlawfully restrained and monopolized the foreign trade of the United States in this sector; and (Complaint, Par. 36; R. 6-7) the unlawful combination and conspiracy, attempts to monopolize and monopolization have, as intended by the defendants, prevented other shipping lines from competing with the defendants in this trade.

The prayer for relief (eliminating the language generally requesting an injunction against monopolization, restraints of trade, etc.) prays (Prayer 4; R. 7)

that the exclusive patronage contracts be cancelled and that the defendants be perpetually enjoined from entering into any other contracts or participating in agreements, understandings, practices or arrangements having a tendency to continue or revive the alleged violations of the Sherman Act; and (Prayer 5; R. 7) that defendants be required within 60 days after date of judgment to send a copy of the judgment to each contract shipper together with a notice that his contract has been cancelled.

Pertinent provisions of the Far East Conference Agreement (Exhibit A) and the Far East Trade Agreement which went into effect in 1945 (Exhibit B) will be discussed respectively at pages 39 to 44 and 67 to 68 *infra*.

(c) The answers.

In due course, the petitioner Isthmian Steamship Company served its answers (R. 21, 46) and the petitioners other than Isthmian Steamship Company served their answers (R. 21) and, pursuant to leave granted by the Court, the petitioners filed their respective supplemental answers (R. 80, 88).

(d) The motions.

The respondent, United States, made a motion for judgment on the pleadings (R. 93). The petitioners made their respective cross-motions to dismiss the complaint (R. 72, 74) based generally upon the proposition that the facts alleged in the complaint state a claim, if any, under the Shipping Act and not under the Sherman Act; and that, accordingly, the complaint should be dismissed for the reason that it does not state a claim against the petitioners upon which relief can be granted; but states a claim, if any, of which the District Court has no jurisdiction and of which the Board has exclusive jurisdiction.

(e) Intervention of the Board.

At this juncture, the Board moved for leave to intervene as a defendant (R. 94) and further moved "for an order dismissing the complaint upon the grounds that (1) this Court lacks jurisdiction over the subject matter of this action; and (2) the complaint fails to state a claim upon which relief can be granted." (R. 95).

(f) The order of the District Court.

After hearing argument of counsel and reading the briefs submitted in support of the motions made by all parties, the District Court, on March 7, 1951, entered its order denying all of the motions (R. 104).

The order granting the writ of certiorari herein brings up for review only so much of the order of the Court below as denied petitioners' motions for a dismissal of the complaint.

(g) The opinion of the District Court.

Prior to the entry of the order of the Court below, the presiding District Judge filed his opinion (R. 97).

As we understand it, the denial of petitioners' motions was predicated on several grounds. The first point made in the opinion is that, since the allegations of the complaint charge violations of Sections 1 and 2 of the Sherman Act, the express provisions of Section 4 of that Act require the Court to retain jurisdiction of the case, notwithstanding the provisions of the Shipping Act. The reason put forward by the Court below is that the only exemption from the provisions of the Sherman Act "is granted by a specific provision of the Shipping Act, but even this exemption may not be construed as a restriction on the jurisdiction of this court" (R. 99).

Secondly, the Court stated that, notwithstanding that the Conference agreement, having been approved by the Board, may be within the purview of the statutory exemption, it does not follow that all conduct of the petitioners, and the practices in which they may be concertedly engaged are exempt from the provisions of Section 1 of the Sherman Act (R. 99).

Thirdly, the Court stated that the specific immunity from the Sherman Act which follows from the approval of a conference agreement under Section 15 of the Shipping Act (46 U. S. C. § 814), does not constitute a limitation on the jurisdiction of the Court. It constitutes merely a legal defense not otherwise available. It does not curtail the authority vested in the Court by the specific provisions of Section 4 of the Sherman Act (R. 100-101).

Finally, the Court predicated its denial of petitioners' motions upon the ground that the United States is not a "person" within the intendment of Section 22 of the Shipping Act (46 U. S. C. § 821). It viewed the opinion of this Court in *United States Navigation Company, Inc. v. Cunard Steamship Company, Ltd.*, 284 U. S. 474 (1932)³ as approving the dismissal of the complaint there on the ground that the private plaintiff had an adequate remedy under the Shipping Act; and distinguished the case at bar from *United States Navigation* on the ground that, since, in the Court's opinion, the United States is not a "person", the United States does not have any remedy except that under the Sherman Act (R. 101-102).

³ In the text of this brief all Court opinions are cited only to the official reports. Citations to the unofficial reports, however, appear in the foregoing table of citations.

Specification of Errors to Be Urged.

The District Court erred:

1. In holding that it had jurisdiction of the subject matter of the action.
2. In holding that the subject matter of the action was not within the exclusive primary jurisdiction of the administrative agency established under the Shipping Act.
3. In holding that, notwithstanding the provisions of the Shipping Act, a cause of action under the Sherman Act was alleged.

Summary of Argument.

I. The case law.

(a) The decisions of this Court are persuasive that the questions presented should be answered in favor of the petitioners.

In *United States Navigation*, 284 U. S. 474 (1932), suit was instituted by a competing steamship company against a combined group of the remaining carriers in the trade for an injunction against violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2). All of the wrongs charged against the petitioners in the instant case were charged against the defendant steamship companies in *United States Navigation*. This Court held that the District Court did not have jurisdiction but that the case was one over which the Board had primary jurisdiction. The Court specifically saved the question whether the same rule would apply if the Government were the plaintiff. Nevertheless, the reasoning of the opinion requires that the same rule should be applied.

This Court proceeded upon the grounds (i) that the Shipping Act had set up a comprehensive set of standards of right and wrong for the steamship industry;

that, to the extent that the acts of the defendants ran afoul of some of the interdictions of the Shipping Act, the remedies prescribed by the Shipping Act supersede those prescribed by the Sherman Act; (ii) that the argument to the effect that a conference agreement providing for the contract system⁴ cannot legally be approved, is unsound; and (iii) that the issues presented in such controversy, particularly with respect to the legality of a contract system in any set of circumstances, involve intricate questions of steamship economics and history which are generally unfamiliar to a judicial tribunal but well understood by the Board and with which the Board is, consequently, better able to deal.

In *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297 (1937), the Court laid down the criteria to be applied when the legality of a contract system requires determination. An examination of these determinative factors and this Court's action with respect thereto, is persuasive that the Congress has vested in the Board the exclusive primary jurisdiction over this question. In a footnote to the opinion in *Swayne & Hoyt id.* at 307, this Court expressed the view that the contract system is not illegal *per se*.

The determinations of this Court have also indicated that, in principle, the same rule should be applied in such situations, irrespective of whether the Government or a private litigant is the plaintiff.

In *United States v. Pacific & Arctic Railway & Navigation Co.*, 228 U. S. 87 (1913), this Court determined that, even when the United States prosecutes, on the criminal side, a cause which involves issues

⁴ The practice of promulgating and making charges in accordance with a tariff specifying two levels of rates, the lower of which is available only to shippers who sign contracts to confine their shipments exclusively to vessels of the conference lines, is referred to in this brief as the "contract system".

falling within the competence of the Interstate Commerce Commission, primary resort to that agency is necessary.

In *United States v. Terminal Railroad Association of St. Louis*, 224 U. S. 383, 412 (1912); 236 U. S. 194, 207-209 (1915); and *Terminal Railroad Association of St. Louis v. United States*, 266 U. S. 17, 29-31 (1924), this Court rejected the repeated efforts by the Attorney General to persuade it to include within its decrees, determinations which were within the competence of the Interstate Commerce Commission. This Court approved decrees limited to matters with which the Commission was not empowered to deal.

(b) The case at bar requires more imperatively than *United States Navigation* the application of the rule announced in that case because here the complaint alleges the approval by the Board of the Far East Conference Agreement (R. 4-5).

Petitioners urge that the approval of that agreement exempts them from prosecution of a suit for violation of the Sherman Act for either of two reasons: (i) the agreement itself is sufficiently broad to warrant the petitioners in the maintenance of the contract system; and if any doubt should exist with respect to its scope and coverage, the interpretation placed upon the agreement by the Board has been such as to give it a meaning which brings the maintenance of a contract system within its scope; and (ii) if, perchance, this Court should, notwithstanding administrative interpretation, deem the agreement insufficiently specific, a court should not issue an injunction which can be obviated by the subsequent approval by the Board of an amendment to the Conference Agreement so as to add thereto a clause which would unequivocally authorize the maintenance of a contract system. A court of equity will not enter a decree which would thus constitute what this Court has re-

ferred to as an idle gesture. *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439, 461 (1945).

(c) The practical construction of the Shipping Act sustains petitioners' position.

The decisions of the Board in cases involving the contract system have determined that the system is not illegal *per se*; but that the legality in each instance must be determined by weighing the necessity for stability of rates and regularity of service against the desirability of free competition. In performing this function, the Board has, when required, legislatively prescribed proper conduct for the Conference, as a condition of the continued maintenance of the contract system. The interpretation given by the Board during the history of the Shipping Act is entitled to great weight in determining whether or not the contract system is illegal *per se*. *United States v. Midwest Oil Co.*, 236 U. S. 459, 472-473 (1915) and *Inland Waterways Corp. v. Young*, 309 U. S. 517, 524-525 (1940).

II. The statutory law.

(a) A comparative analysis of the Sherman Act and the Shipping Act is persuasive that the purpose of the Congress was to excise the business of common carriage by water in foreign commerce from the body of our economy which had been made subject to the Sherman Act.

The purpose and philosophy of the Sherman Act is that the general welfare of the community is best served when all units in a field of industry engage in unrestrained competition. The Shipping Act, on the other hand, contemplates the service of the public welfare by an entirely different political concept, i.e., the agreement and cooperation among common carriers for the purpose, among others, of "controlling, regulating, preventing, or destroying competition" (Shipping Act, Section 15) which, but for the

Shipping Act itself, would have flown in the face of the basic antitrust theory. Section 15 (46 U. S. C. § 814) itself permits the members of a conference to enter into agreements which affect the business of carriers who are unwilling to join the conference.

Section 15, however, does not give to ocean carriers the untrammelled right to combine and to function as they might see fit. The validity of new conferences is made subject to advance Board approval of their basic agreements, and the legality of all conferences, old and new, can at any time be brought to an end by Board disapproval of their agreements (Shipping Act, Section 15; 46 U. S. C. § 814). *Public regulation of combined activity was thus substituted for free competition.* The privileges which may be exercised by such conference members are, moreover, strictly circumscribed by specific sections of the Shipping Act which prohibit, on pain of heavy penalties or onerous fines or imprisonment or both, conduct deemed by the Congress to be hostile to the public interest.

The Board is given plenary power, either on its own motion or on complaint, to investigate any violation of the Act *and to enter the appropriate remedial order* (Shipping Act, Section 22; 46 U. S. C. § 821) which, in turn, is enforceable by Court injunction (Shipping Act, Section 29; 46 U. S. C. § 828) or judgment (Shipping Act, Section 30; 46 U. S. C. § 829).

While, doubtless, members of a conference would be amenable to Sherman Act prosecution if they should conspire with industrial or commercial shippers so as to restrain trade or to produce a monopoly in the fields of commerce or industry in which such shippers might be engaged (*Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U. S. 500, 515-516 (1936)), it is clear that any action by a conference or its members which

may be unfairly or unduly prejudicial to the rights of shippers or of a competitor in the field of shipping, constitutes a violation of the Shipping Act and not of the Sherman Act, with the purposes of which it is diametrically in conflict.

(b) The Shipping Act does not prohibit the Board's approval of agreements which permit the maintenance of the contract system.

Petitioners accept *arguendo* the Attorney General's contention that the contract system will destroy outside competition. Section 15 of the Shipping Act permits the Board to approve agreements "preventing, or destroying competition". The Attorney General has contended that such agreements may prevent or destroy competition only among the parties to the agreement. Section 15 is barren of any language to support this contention; but, on the other hand, it contains internal evidence that such was not the purpose of the enactment. This same section gives the Board power to disapprove, cancel or modify any agreement, whether or not previously approved by it, which it finds to be unjustly discriminatory as between carriers. In view of the unlikelihood that a carrier would become a party to an agreement which discriminates against it, the carrier against whom the Congress contemplated that unjust discrimination might be practiced is a carrier not a party to the agreement.

Statutory evidence for this contention is likewise found in Section 14 of the Shipping Act (46 U. S. C. § 812). Under subdivisions First and Second, conferences as well as individual carriers are prohibited from paying deferred rebates and from using fighting ships. If Section 15 did not contemplate that approved conferences might adopt restrictive competitive methods against non-conference lines, the prohibitions of Section 14, subdivisions First and Second, against action by carriers in combination, would be surplusage.

Nor is there any force to the argument that Section 14, subdivision Third, constitutes a prohibition against the contract system. First, although subdivisions First and Second proscribe acts by carriers under agreements, subdivision Third is silent on this score. Hence subdivision Third applies to actions by individual carriers only. Secondly, subdivision First of Section 14 prohibits *deferred* rebates and is at great pains to define the nature of the deferment. Subdivision Second is equally explicit in defining the meaning of the term "fighting ship". Subdivision Third does not even mention the contract system. The prohibition against "resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * *," can scarcely even, by strained construction, be made to refer to the contract system. This point is rendered doubly apparent when it is considered that subdivision First does not prohibit *all* rebates as a consideration for the shipper's giving all of his shipments to the conference carriers. The rebate is prohibited only if it is *deferred*. Certainly, if the conference may be authorized by Board action to give rebates, currently payable, in exchange for exclusive patronage, a construction of the Act which would prevent the conference carriers from charging the net rate in the first instance, would be anomalous. Thirdly, if subdivision Third be construed to outlaw the contract system, then, *a fortiori*, it would outlaw the deferred rebate system and subdivision First would be mere surplusage.

Finally, it is to be noted that a violation of Section 14 is a misdemeanor punishable by a fine of not more than \$25,000 for each offense—the largest cash penalty stipulated in any section of the Act. The section is, therefore, highly penal. If the Attorney General's underlying contention were correct, the penalties and sanctions of the Sherman Act would be piled on those

specifically provided for in Section 14. Therefore, the section should not be held to extend to cases not covered by the express meaning of the words used. *United States v. Resnick*, 299 U. S. 207 (1936).

III. Legislative history.

If there should be any doubt whether the language of the Shipping Act supports our contentions, the legislative history of that statute dispels all uncertainty.

The Act was adopted at a time when the Government had been defeated in all anti-trust cases which it had instituted against steamship conferences. An investigation into these conferences had been ordered by House resolutions which are instinct with animosity against the conference system and with determination to uproot them. After a lengthy investigation in which prime considerations of steamship economies were for the first time explored in this country, the Congressional investigating committee reached the conclusion that monopoly and restraint of trade were not the ills which were afflicting the ocean-carrying trade. It reached the conclusion that the real ills to be prevented were destructive rate wars and other predatory practices which are inevitable under a regime of free and unregulated competition in ocean transportation; that such competition cannot be prevented in the absence of a combination among the individual steamship lines; that rate wars are injurious to the carriers, and in the long run result in the elimination of the weak lines and the preservation and, possibly, consolidation of the strong, thus resulting in, and not preventing, a monopoly; that such rate wars and the instability in rates which they represent, place American merchants at a great disadvantage in their rivalry with their foreign competitors, for the reason that such instability deprives the American

merchant of the ability to contract for delivery abroad at specified dates and to quote firm prices for future c.i.f. or c. & f. delivery. Under the foreign laws, the foreign merchant is under no such disability.

The Committee was under no misapprehension, however, that the steamship lines could be permitted to combine with benefit to the public unless they were made subject to regulation by a powerful Governmental agency. The Board was set up with far-reaching power to protect the public interest.

Thus stands out the purpose to substitute regulated combination for the unrestrained competition and to create the Board as the protector of the public interest in this important branch of the national economic life.

With equal clarity the legislative history demonstrates that the Shipping Act should not be construed as rendering the contract system illegal. The recommendations of the legislative Committee specifically contemplate that Section 15 had the purpose of authorizing conference agreements which should affect the competition not alone among the conference members but as well between the conference members and the non-conference lines. The Committee report also demonstrates that the investigation had revealed the employment by conferences of the contract system as well as the employment of deferred rebates and of fighting ships. The indefinite language of Section 14, subdivision Third, can thus not be applied to a very definite competitive practice, *i. e.*, the contract system, of which the Committee had been made aware.

IV. The Court below erred in ruling that the United States has no remedy other than under the Sherman Act.

It follows from what has been said that the Congress set up the Board as the representative of the United States to bring about conformity by ocean carriers to the provisions of the Shipping Act. Section 22 of the

Act (46 U. S. C. § 821) empowers the Board, without prior complaint from anyone, to investigate violations of the Act and to enter orders bringing such violations to an end. The Board has frequently exercised this power.

The ultimate plaintiff in this case, the United States, therefore, does have a remedy, other than a hypothetical one under the Sherman Act, and the public welfare is thus completely protected even if the Attorney General were not empowered to initiate proceedings before the Board. Petitioners contend, however, that he is empowered so to proceed; that the term "person" as used in Section 22, is broad enough to include the sovereign.

V. The freight contract between the Conference and the shipper is not subject to attack under the Sherman Act.

The Attorney General argued below that the contract between the Conference and the shipper is a violation of the Sherman Act, for the reason that Section 15 of the Shipping Act (46 U. S. C. § 814) authorizes the Board to approve only agreements among common carriers or among other persons subject to the Act, or among parties in both such classes. There are two answers to this contention:

First, the complaint is based upon an alleged combination and conspiracy among the petitioners, the essence of which is the dual rate system supported by exclusive patronage contracts with a great number of shippers. The result of this conspiracy is alleged to be the exclusion of other carriers from the outbound Far East trade, and the restraint of trade, and monopoly. The attack is not made upon the contract with the shipper as, in and of itself, constituting a violation of the Sherman Act.

Secondly, the contract with the shipper constitutes only one of the conditions of the tariff providing for dual rates. If the Board has the power to approve the adoption of dual rates and the contract system, it follows that the carriers, under an approved agreement, may legally do all that is necessary in the performance of that agreement, and that contracts with shippers entered into in the course of such performance, are shielded from illegality. *Cf. Central Transfer Co. v. Terminal Railroad Association of St. Louis*, 288 U. S. 469, 476 (1933).

VI. The interpretation of the Shipping Act urged by petitioners would not render that statute unconstitutional.

The Attorney General may here contend that the Shipping Act should not be interpreted as urged by petitioners for the reason that, so interpreted, it would be unconstitutional. That argument proceeds upon the hypothesis that a conference holds the power, by the institution of the contract system, either to exclude an outside line from the trade or to compel it to join the conference. So the argument is that, by petitioners' interpretation, the group of private carriers would be vested by the Congress with the right to issue or withhold certificates of convenience and necessity. The argument proceeds that this result would render the Act unconstitutional in accordance with the principles laid down in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 537 (1935).

Petitioners urge that such argument is without force, even conceding, for the purpose of the discussion, that the contract system does have the far-reaching economic effect stated in the hypothesis. The reason is that in *Schechter*, the Congress had laid down no standards by which any Governmental agency could supervise or negate actions of the parties operating under a code; whereas, the Shipping Act abounds with specific directions to the Board to govern its regula-

tion of conferences. This distinction is decisive. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 388, 395-396, 399 (1940).

VII. The cases relied upon by the Attorney General.

The cases relied upon by the Attorney General do not establish the proposition that in antitrust attacks upon parties engaged in a regulated industry, there is one rule when the United States is the plaintiff and another rule when a private litigant is the plaintiff. It is true that under Section 16 of the Clayton Act (15 U. S. C. §26), the United States may, but a private litigant may not, seek injunctive relief against common carriers subject to the Interstate Commerce Act, in respect of any matter subject to the jurisdiction of the Interstate Commerce Commission. Section 16 has not, however, been extended so as to make its proviso applicable to carriers subject to the Shipping Act. Cases according to the United States a remedy denied to private litigants because of the proviso in Section 16, can, therefore, have no application here.

The rule that a shipper may not, under Section 7 of the Sherman Act (15 U. S. C. § 15) sue interstate carriers for treble damages inflicted by illegal combinations (*Keogh v. Chicago & Northwestern Railway Co.*, 260 U. S. 156 (1922)), is not to the contrary. It is predicated upon the proposition that to permit the shipper so to recover might result in giving him an unlawful preference.

Until interstate carriers were permitted to combine under the supervision of the Interstate Commerce Commission for the purposes of rate-making (*Reed-Bulwinkle Act*, 49 U. S. C. § 5b), combinations of such carriers for that purpose constituted violations of the Sherman Act and injured shippers were accorded the same right as the Government to prosecute a suit in equity to restrain the continuance of such combina-

tions. So much is demonstrated by a comparison of *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439 (1945) with *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897) and *United States v. Joint Traffic Association*, 171 U. S. 505 (1898).

Nor is a case applicable where the regulatory statute grants to the administrative agency mere inquisitorial power but no power to hear, determine and finally dispose of the complaint. *United States Alkali Export Association, Inc. v. United States*, 325 U. S. 196 (1945).

Further, the Attorney General's position is not sustained by reference to a case in which the conspiracy included persons other than those engaged in the regulated industry or in which the regulatory statute does not, in and of itself, contain a prohibition of the acts complained of. *United States v. Borden Co.*, 308 U. S. 188 (1939).

ARGUMENT.

FIRST POINT.

PRECEDENT FAVORS PETITIONERS' CONTENTIONS.

- (a) Cases decided by this Court lead to the conclusion that the complaint fails to state a claim under the Sherman Act and that the Court below was without jurisdiction of the cause.

The complaint is predicated solely upon alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2). The jurisdiction of the District Court was predicated upon Section 4 of that Act (15 U. S. C. § 4) (R. 1). It is petitioners' position that cases which have been decided by this Court lead by inexorable logic to the conclusion that if the facts alleged in the complaint constitute a violation

of any statute, that statute is the Shipping Act, and not the Sherman Act; and that the wrongs complained of, if existant, are remediable by the Board, which has exclusive primary jurisdiction, and not by the courts.

In *United States Navigation Company, Inc., v. Cunard Steamship Company, Ltd.*, 284 U. S. 474 (1932), the same charges as appear in the complaint herein were made against the lines which were engaged in the trade from United States North Atlantic ports to ports in Great Britain and Ireland. The complaint there also charged violation of the Sherman Act. That the charges in *United States Navigation* were identical with those here, appears in the following language of this Court (*id.* at 479):

"The conspiracy involves the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents. The differentials thus created between the two rates are not predicated upon volume of traffic or frequency or regularity of shipment, but are purely arbitrary and wholly disproportionate to any difference in service rendered, *the sole consideration being their effect as a coercive measure.* * * *" (Italics supplied.)

United States Navigation was even stronger against the defendants than the case at bar. Here, the complaint alleges that the defendants have an agreement approved by the Board which authorizes their co-operative rate and tariff making (R. 4-5, 10-11). In *United States Navigation* the complaint did not allege that there was any filed and approved conference agreement but alleged that no agreements authorizing the use, by the defendants, of the contract system, or any similar agreements, had been filed with or ap-

proved by the Board (*United States Navigation, Record, Amend. Bill of Complaint*, par. 70). The defendants, without answering, moved to dismiss the complaint for insufficiency and for want of jurisdiction on the part of the Court. The motion was granted in the District Court [39 F. 2d 204 (S. D. N. Y. 1929)], affirmed by the Circuit Court of Appeals [50 F. 2d 83 (2d Cir. 1931)] and unanimously affirmed by this Court. The essence of this Court's decision was its concept that the acts charged were violations of the Shipping Act and that, to the extent that the acts constituted violations of both the Shipping Act and the Sherman Act, the remedy under the Shipping Act had superseded that under the antitrust laws.

The Court after reviewing the provisions of Sections 14, 14(a), 16, 17 and 22 of the Shipping Act [46 U. S. C. §§ 812, 813, 815, 816 and 821] used the following language (284 U. S. at 486-487):

"A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and *the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws.* Compare *Keogh v. Chicago & N. W. Ry. Co.*, *supra* at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. * * *

"There is nothing in §15 of the Shipping Act which militates against the foregoing views. That section requires that agreements between carriers, or others subject to the act, in respect of a number of enumerated matters, or 'in any manner providing for an exclusive, preferential, or co-

operative working arrangement,' shall be filed immediately with the board; and that the term 'agreement' shall include understandings, conferences, and other arrangements. Thereupon, the board is authorized to disapprove, cancel or modify any such agreement, 'whether or not previously approved by it,' which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., 'or to operate to the detriment of the commerce of the United States, or to be in violation of this Act.' *But a failure to file such an agreement with the board will not afford ground for an injunction under § 16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist. If there be a failure to file an agreement as required by § 15, the board as in the case of other violations of the act, is fully authorized by § 22, supra, to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under § 31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission.* (Italics supplied.)

The plaintiff argued there, as does the Attorney General here, that an agreement authorizing the maintenance of the contract system is illegal and that the Board had no power to approve such an agreement. This Court gave its answer to this argument (*id.* at 487):

"A contention to that effect is clearly out of harmony with the fundamental purposes of the act

and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications." (Italics those of the court.)

Thus was disposed of the argument that the contract system is illegal *per se*.

Lest it be urged that upon the question of legality or illegality this Court did not take into consideration the provisions of Section 14, subdivision Third, of the Shipping Act (46 U. S. C. § 812 Third), we call attention to this Court's review of various sections of that Act and, particularly, to the following sentence (*id.* at 483-484):

"Section 14 prohibits retaliation by a common carrier by water against any shipper by resort to discriminating or unfair methods because the shipper has patronized another carrier; and § 14a confers power upon the board to determine the question. * * *"

Support in principle for the rule announced in *United States Navigation* is found in *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297 (1937). There,

after repeated hearings (*Intercoastal Investigation, 1935*, 1 U. S. S. B. B. 400 (1935); *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524 (1936)), the Board had entered an order directing the cancellation of the schedules of tariffs of the Gulf Intercoastal Conference which provided for the maintenance of the contract system. The Board emphasized that the lines in this intercoastal conference were subject to the stabilizing action of the Board under Section 3 of the Intercoastal Shipping Act, 1933 (46 U. S. C. § 845).

The determination by the Board was sustained by this Court on the ground that there was evidence to support the Board's findings. So much appears in 300 U. S. at 304:

"Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. * * *

The Court made it quite clear, however, that it did not deem the contract system illegal *per se*. It laid down the criteria which should guide the Board in passing upon the legality or illegality of such systems. A statement of these critical factors carries conviction that in no case should a court be charged with making the initial findings of fact. The following appears in 300 U. S. at 304:

"In determining whether the present discrimination was undue or unreasonable * * * [the Board] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvan-

tages of the former against the advantages of the latter. This was clearly recognized in the report upon which the present order is based. It states that the danger of cut-throat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, * * * [the Board] concluded that this was the real purpose of the contract rate."

The balancing of the advantages mentioned is, we submit, an operation involving the determination of economic and not legal questions.

The Court concluded its opinion by appending thereto a footnote, in which it dealt with the question whether contract systems are illegal *per se*. This footnote would seem to constitute a part of the decision, and not dictum, because the Court might have disposed of the controversy on the ground either that the contract system was outlawed by the Shipping Act or on the ground that the legality in the particular case was a matter to be decided in the first instance by the Board, whose findings, if supported by evidence, would not be set aside. The footnote appears in 300 U. S. at 307. After quoting the definition of deferred rebate which appears in Section 14 of the Shipping Act, it proceeds as follows:

"The report of the House Committee on Merchant Marine & Fisheries, H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, *c. g.*, pp.

103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. *W. T. Rawleigh Co. v. Stoomvaart*, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co. v. Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41."

It is to be observed that in *United States Navigation*, this Court saved the question whether the same rule would apply if the Government were the plaintiff seeking injunctive relief under the Sherman Act. We submit that there is no reason in principle why the rule applied in one case should not be applied in the other. Certainly the statutory provisions of the Shipping Act which were considered and analyzed by the Court in *United States Navigation* (284 U. S. 474, 483-484 (1932)), in their specific inhibitions against proscribed conduct of conferences, supersede, to the extent of their restrictions, the very general language of the Sherman Act to the same extent when the Government, as when a competitor, seeks an injunction. The criteria to determine the validity or invalidity of a particular contract system should not vary, dependent upon the character of the party plaintiff. The power of the Board to dispose of the matter is not less adequate in the one case than in the other.

The need for uniform treatment of this problem, which affects so large a segment of our economic

life, demands that a single agency shall at all times apply the criteria; and that the expert knowledge and experience of a specialized agency should be made available in all cases. The need for a uniform disposition of important questions of transportation policy was one of the principal signposts which led this Court to deny the jurisdiction of the District Courts in cases where the administrative agency was competent to deal with the matter; and that, notwithstanding a statute which specifically gave the courts and the agency concurrent jurisdiction. *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). Any other rule would result in uncertainty in the application of the critical tests because of the varying experience in such matters of the judges in the District Courts within whose districts any members of the Conference may be served with process and where the antitrust jurisdictional facts may exist.

Another guide which led to the adoption of the primary jurisdiction rule is that the governance of regulated industries requires legislative rather than judicial action. *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285 (1922); *Terminal Railroad Association of St. Louis v. United States*, 266 U. S. 17, 30-31 (1924).

In this connection, it is important to note that the complaint here charges the defendants with exerting combined economic power, with charging coercive rate differentials and with imposing oppressive fines and penalties for deviations from the terms of the freight agreement. We submit that such issues are those with which characteristically an administrative body is especially equipped to deal. Conceivably, a proper determination of the case at bar might involve the permission to the Conference to continue the maintenance of the contract system, conditioned upon the revision of the form of conference freight

contract. Such situation arose in *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948), more fully discussed at pp. 46-47, *infra*. It would appear that dictation of new terms for such freight agreement are legislative in character and beyond the competence of a judicial tribunal.

Authority supports, as reason requires, the extension of the rule of *United States Navigation* to the case at bar.

Perhaps the case which most strikingly demonstrates the amenability of the United States, acting by the Attorney General, to the same rules as private litigants in analogous cases is *United States v. Pacific & Arctic Railway & Navigation Co.*, 228 U. S. 87 (1913). The appeal came up on the action of the District Court upon demurrers to an indictment containing six counts, only the first five of which are here material. Counts 1 and 2 of the indictment charged violation of the Sherman Act. Counts 3, 4 and 5 charged violation of the Interstate Commerce Act. As to all of these counts, the District Court held that the United States must first go to the Interstate Commerce Commission for an adjudication. This Court reversed as to Counts 1 and 2 (those under the Sherman Act) and affirmed as to Counts 3, 4 and 5 (those under the Interstate Commerce Act).

The parties charged with the infringement of the Sherman and Interstate Commerce Acts were (a) two steamship companies running from Seattle, Washington, to Skagway, Alaska, (b) the Canadian Pacific Railway Co., which owned a steamship line running from Vancouver, B. C., to Skagway, Alaska, (c) a wharf company at Skagway which owned all of the wharves at that port at which cargoes could be discharged and transshipped over railroads, (d) certain railroad companies which carried cargoes from Skagway a part of the way to Dawson in Alaskan

territory, and (e) a British company which owned that part of the railway in British Columbia, from the point where it left the Alaskan side of the line to the point at which it re-entered the Alaskan side of the line. The companies mentioned in (d) and (e) above were under common ownership and their properties constituted a single line from Skagway in Alaska to Dawson in Alaska.

Counts 1 and 2 (the Sherman Act counts) charged that all of the parties combined in an arrangement which bound the wharf company at Skagway to charge only \$1.00 per ton for the handling of cargoes brought in by the steamship companies, parties to the combination, but to charge \$2.00 a ton for cargoes brought in by other steamship companies. The arrangement further bound the railroad running partly in the United States territory and partly in the Canadian territory to make through freighting arrangements only with the steamship companies which were parties to the combination, and to charge higher rates for the transportation of cargoes imported on other steamships.

Thus, in the antitrust aspect of the case, the parties were alleged not to be acting voluntarily and freely, as required by their own economic welfare, but to be acting pursuant to an agreement entered into for the purposes of eliminating competition with and securing a monopoly for the steamship company defendants. Of course, before the enactment of the Reed-Bulwinkle Act (49 U. S. C. § 5b) the Interstate Commerce Commission had no power over combinations of carriers to fix rates, regulate competition, and the like.

Based upon these considerations, this Court held that since the rates and agreements were arrived at not by individual action but pursuant to a combination in restraint of trade in steamship transportation, they were illegal under the Sherman Act. In other words,

this was a case of what this Court, at a later date, referred to as a "circumambient conspiracy".⁵

In writing of Counts 1 and 2, the language of this Court in *Pacific & Arctic* was as follows (228 U. S. at 104):

"The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the Interstate Commerce Act, for our present purposes), and if there were nothing else in the case the conclusion of the District Court would have to be affirmed. But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the Anti-trust Law, of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal. * * *

It seems clear, therefore, that in sustaining Counts 1 and 2 of the indictment, this Court was but foreshadowing (a) the pronouncements in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U. S. 156, 161-162 (1922) and in *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439 (1945) to the effect that a com-

⁵ In *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U. S. 500, 515-516 (1936).

bination among carriers to fix reasonable and non-discriminatory rates might still be violative of the Sherman Act, and (b) the rule which applies in the case of a "circumambient conspiracy". In such cases, the Interstate Commerce Commission was powerless to grant relief. Hence it had no jurisdiction, primary or otherwise.

When this Court turned, however, to the third, fourth and fifth counts of the indictment, it gave full force to the application of the primary jurisdiction rule although the action was prosecuted by the United States, acting through the Attorney General; and that, notwithstanding the criminal nature of the proceeding:

The third, fourth and fifth counts of the indictment charged that the railroad in Alaska, by making through freighting arrangements with the defendant steamship companies and refusing to make similar arrangements with the Humboldt Steamship Company, which was not a party to the conspiracy, had acted in a discriminatory manner and had been induced thereunto by certain of the other defendants. Here, where the issues and the parties were within the regulatory ambit of the Interstate Commerce Commission, this Court held that the primary jurisdiction rule was applicable (228 U. S. at 107-108):

"The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal

remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to-wit.: *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, *supra*. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment." (Italics supplied.)

Further strong support is lent to petitioners' position by the series of cases involving the Terminal Railroad Association of St. Louis. The first two appeals to this Court were in *United States v. Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912), and 236 U. S. 194 (1915), an antitrust suit for injunctive relief. The third appeal came on in a proceeding for contempt of court charged by private litigants against some of the defendants in the earlier two cases: *Terminal Railroad Association of St. Louis v. United States*, 266 U. S. 17 (1924). The United States became a party to the third suit when it reached this Court.

The Terminal Railroad Association owned practically all the terminal facilities in St. Louis and the surrounding territory. The stock of the Association

was owned by fourteen of the railroads entering St. Louis. By virtue of the facilities owned by the Association, the controlling railroads had the power to permit or deny to other railroads ingress into and egress from St. Louis.

The Courts found that the controlling railroads denied to other railroads the right to acquire stock in the Terminal Railroad Association and that improper use was made by the owning railroads of the advantages which their ownership gave them. As appears in 224 U. S. at 411-413, when the case reached this Court on the first appeal, the case was remanded to the District Court with directions to enter a decree which had the effect of opening to all railroads entering St. Louis the right to acquire stock in the Terminal Railroad Association on just terms. The decree directed by the Court further provided for equality of treatment to railroads which should not desire to acquire shares in the Association.

In short, all aspects of the general agreement and conspiracy were enjoined. However, this Court was careful to direct that there should be excluded from the decree any matter with which the Interstate Commerce Commission had power to deal. Thus, the Court included in the mandate which was directed, the following item (*id.* at 412):

“Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.”

Upon remand, the District Court entered a decree which provided for the reformation of the Association's contract by the elimination of certain rules. Both the United States and the defendants appealed to this Court. The question before the Court on the second appeal was whether due effect was given to the mandate of the Court resulting from the first appeal.

The United States complained that the Court below had failed to include in its decree a direction for the abolition of an arbitrary which was applied in a preferential manner. This Court rejected the Attorney General's argument that the antitrust decree should impinge upon matters with which the Interstate Commerce Commission was empowered to deal. The entire discussion appearing in 236 U. S. at 207-210 is here relevant. However, the ruling with respect to the view thus urged by the Attorney General is epitomized in the following sentence (*id.* at 207):

"But to have given effect to this view would have caused the decree to be plainly repugnant to the provisions of the Act to Regulate Commerce and contrary to the exercise by the state authorities of their power over charges of the Terminal Company in so far as the jurisdiction of such authorities may have extended. * * *"

After the decree had been entered in the District Court in conformity with the mandate resulting from the second appeal, some of the railroads entering St. Louis from the west brought proceedings against the railroads entering St. Louis from the east and against the Terminal Association, charging contempt of court in that, among other matters, the eastern railroads were not paying to the Association reasonable transfer charges. The District Court held the eastern railroads in contempt. The eastern railroads then

resorted to this Court. The Attorney General joined in the proceeding on behalf of the western railroads and in support of the finding of contempt. This Court reversed. The reasoning is summarized in the following language (266 U. S. at 31):

"The Terminal Association and its subsidiaries are common carriers by railroad and, like the proprietary companies, are subject to regulation by the Commission. The original decree does not purport to regulate rates or prescribe divisions of joint rates, or fix liability for such transfer charges. On the other hand, it expressly provides that it shall not affect in any wise or at any time the power of the Commission over charges to be made by the Terminal Association or its subsidiaries, or any power conferred by law upon the Commission. In the exercise of its powers under existing law, the Commission is untrammelled by the decree and may make and regulate rates on through freight and the divisions thereof. * * *"

It cannot be overemphasized that the *Terminal Railroad Association* litigation involved an antitrust suit prosecuted by the Attorney General on behalf of the United States. Nonetheless, this Court rejected every attempt of the Attorney General to have it impinge, in the slightest degree, upon matters within the jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act.

Thus, there is rounded out authority for the dismissal of the complaint below—*United States Navigation* (supported by *Swayne & Hoyt*), which holds that the matters such as here are alleged in the complaint come within the competence of the Board; and *Pacific & Arctic* and *Terminal Railroad Association*, which hold that in actions instituted by the Attorney General, whether or not antitrust in character, the

courts should not adjudicate matters which fall within the competence of the regulatory agency and should not deal with such matters in an antitrust decree.

- (b) Because of the approval by the Board of the Far East Conference Agreement, this case calls more imperatively for primary resort to the Board than did *United States Navigation*.

In *United States Navigation* (284 U. S. 474 (1932)), the complaint specifically averred that the alleged agreement among the defendants had not been approved by the Board. The complaint in the case at bar specifically alleges that the Far East Conference Agreement was approved by the Board on November 14, 1922 (Par. 29; R. 4-5). That agreement, by an appropriate construction of its terms, authorizes the petitioners to do the acts of which complaint is here made. Any doubt as to the propriety of this construction is set at rest by the long continued interpretation of the agreement by the Board. If petitioners are right in this view, then, by the specific language of the Shipping Act, Section 15 (46 U. S. C. § 814), this agreement has been "excepted from the provision of the [Sherman] Act * * *."

We need consider only Paragraphs 1, 8 and 9 (R. 8, 10-11) of the basic Far East Conference Agreement. For ready reference we quote the material parts of them:

"1. All freight or other charges for the transportation of cargo between the aforementioned ports shall be charged and collected by the parties hereto strictly in accordance with the tariff of rates and charges agreed to by the parties.

* * * *

"8. The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freights, brokerages, or other charges, or

the regulation of transportation between the aforementioned ports at any meeting of the Conference, provided that notice in writing, descriptive of the matter to be considered, has been given each party hereto by the Secretary, at the direction of the Chairman, at not later than 4 P. M. of the day prior to the date of meeting; * * *."

"9. * * * the parties shall establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the agreement by the affirmative vote of the majority of their number, at any meeting held in accordance with the provisions of Article 8 hereof, and all of the parties hereto agree that they will be bound by the affirmative vote of the majority of their number upon the matters aforesaid with the same force and effect as if expressly made a part hereof."

Petitioners contend that the language above quoted authorizes them, acting as a conference, to establish and maintain a contract system. Petitioners urge that the dual rates established and the contract form employed, constitute an appropriate part of their tariffs and of the regulations incorporated in the tariffs.

Obviously, no rate for the transportation of property between two termini, taken by itself, has any meaning. In order to give it meaning, the tariff must answer many questions. Some of these questions are: the point at which the carrier shall take possession and the point at which delivery shall be made; the form of packing which must be employed in making the goods ready for transportation; the value which the shipper shall be entitled to recover in case of loss or damage in the absence of an *ad valorem* payment; whether the rate is predicated on the *volume* of patronage (*e. g.*, car load lots); and whether the rate

shall be applied on the basis of weight or measurement.

The right to promulgate the regulations to be complied with by anyone desiring to enjoy a rate is implicit in the right to adopt a tariff. The right granted by the Conference Agreement to fix rates does not limit the rates so fixed to a single rate for each commodity. So long as no provision of the Act is violated; the right to fix rates carries with it the right to fix rates at more than one level. If the rates at the lower level have attached thereto as a condition for the enjoyment thereof the execution by the shipper of a special form of agreement open to all shippers, the provision for, and the form of, such agreement constitute an appropriate function of tariff-making.

That the Board recognized that the contract system is a part of the rate-making function, is indicated in *Rawleigh v. Stoomvzart*, 1 U. S. S. B. 285, 292 (1933):

"The contract rate practice as a practice is not new, and by implication it must be said to have received approbative attention at the hands of a committee of Congress after a lengthy and painstaking investigation of combinations and practices of carriers by water. It has presently almost universal practical application, being used in multitudinous daily transactions by carriers the world over. Like the method of charging rates upon a weight or measurement basis, and, in interstate trades, the carload-less carload mode of rate making, it is a system of rate application which finds acknowledged adaptability in ocean transportation. An important attribute of it is equality of rate treatment as between large and small shippers. * * *"

The Board has, in adversary proceedings, approved, conditionally or unconditionally, of the conduct of

contract systems by conferences whose basic agreements did not specifically authorize the maintenance of such system. *Rawleigh v. Stoomvaart*, 1 U. S. S. B. 285 (1933); *Phelps Bros. & Co., Inc. v. Cosulich-Societa*, 1 U. S. M. C. 634 (1937); *Sprague Steamship Agency, Inc. v. A/S Ivarans Rederi*, 2 U. S. M. C. 72 (1939) and *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948).

It is true that in none of the cases last cited does the Board specifically refer to the form of conference agreement there under consideration. An examination of the approved agreements in the archives of the Board, however, demonstrates that the statements above made are correct.

That the Board has never considered the inclusion in a conference agreement of a specific provision authorizing the maintenance of a contract system as being essential, appears from the language of the Board in *Isbrandtsen Company, Inc. v. North Atlantic Continental Freight Conference*, 3 F. M. B. 235 (1950) (reversed on other grounds, *Isbrandtsen Co., Inc. v. United States*, 96 F. Supp. 883 (S. D. N. Y. 1951); here on review in Nos. 134 and 135). The Board stated (3 F. M. B. at 241):

“Based on the intrepretation [of the Shipping Act, § 14(3)] above outlined, our predecessors since 1931 approved no fewer than 32 conference agreements which provide *either specifically or inferentially* for the dual rate system—and of these agreements, 24 are now in effect and the respective conferences are making active use of the dual rate system.” (Italics supplied.)

The adoption and maintenance by the Far East Conference of the contract system has, in an official Board proceeding to which it was relevant, been recognized as a practice in which the Far East Conference was engaged in its activities under the Far East Conference Agreement, *In Investigation—Section 19*

of *Merchant Marine Act, 1920*, 1 U. S. S. B. B. 470 (1935), the Board investigated the violent rate wars which had been prevalent due to the activities of non-conference lines, and, at pages 476-481, considered particularly the character of this war and its effect upon the commerce to the Far East. At pages 479 and 480, there appear tables illustrating the downward spiral of rates which had constituted the prime manifestation of the rate war. In Table II (p. 479) and Table III (p. 480) appear columns which bear the caption, "Conference contract rates". With respect thereto the Board said, at page 480:

"It will be noted that in Tables II and III the rates of the conference are headed 'contract' rates. Prior to the collapse of the Far East Conference in 1931, it had been the practice of the conference to give on some commodities reduced or 'contract' rates to all shippers, large or small, who agreed to give all their business for a period of one year to the conference carriers. Effective September 1, 1932, as a result of the combined competition of Isbrandtsen-Moller and Ellerman & Bucknall, the conference revived this contract rate system and extended it to practically all commodities. This move by the conference was countered by substantial additional cuts in rates by Ellerman & Bucknall as indicated in Table II."

The Board thereupon proceeded to consider the evils resulting from non-conference cutrate competition in five other trades; and then (*id.* at 490-503) condemned the acts of the non-conference lines and promulgated a rule which was intended to aid in restoring stability.

We submit that the foregoing demonstrates that the Board has, for a period of at least fifteen years, interpreted its order approving the Far East Conference Agreement as being sufficient in scope to justify

the maintenance of the contract system which has been in effect for over twenty years.

The ultimate criterion as to the meaning of an order or regulation promulgated by an administrative agency is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the order or regulation. *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 413-414 (1945) and *United States v. Eaton*, 169 U. S. 331 (1898).

If the Court should, nevertheless, share the Attorney General's view that the Far East Conference Agreement is not sufficiently specific in its language to justify the Conference in maintaining the contract system, this defect could readily be remedied by Board approval of an amendatory agreement providing for the contract system in so many words. In such matters it has been the practice of the courts not to issue injunctions, the effects of which could be obviated by subsequent administrative action. To issue such an injunction is referred to as "an idle gesture". A recent expression of the judicial attitude on this matter is to be found in *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439, 461 (1945), where the following language appears:

"Moreover, the relief sought from this Court is not an uprooting of established rates. We are not asked for a decree which will be an idle gesture. We are not asked to enjoin what the Commission might later approve or condone."
* * *

(c) Practical construction supports petitioners' contentions.

Since the adoption of the Shipping Act, the Board has uniformly held that the contract system is not illegal *per se*; but that the legality or illegality of such system must be determined in each case by the appli-

cation of criteria such as were specified by this Court.⁶ On well recognized principles great weight should be attributed to this practical construction by the Board.

In *Eden Mining Co. v. Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41 (1922), the Board held that a contract system instituted by the only steamship line in the trade would tend only towards monopoly and was bad.

In *Intercoastal Investigation*, 1935, 1 U. S. S. B. B. 400 (1935) and in *Gulf Intercoastal Contract Rates*, 1 U. S. S. B. B. 524 (1936) the Board held that a contract system established by an intercoastal conference was bad for the reasons that Section 3 of the Intercoastal Shipping Act (46 U. S. C. § 845) enabled the Board to establish a degree of stability which is impossible in international shipping; and that the conference agreement was restrictive with respect to the admission of new members (1 U. S. S. B. B. at 530). The only purpose of that contract system was to create a monopoly. As we have seen, the Board was sustained in its position by this Court (*Swayne & Hoyt*, 300 U. S. 297 (1937)).

In *Rawleigh*, 1 U. S. S. B. 285 (1933), a contract system was attacked by a non-contract shipper who sought to recover the difference between the non-contract rates which he had paid and the lower contract rates. After holding that each contract system must be adjudged on its merits (*id.* at 291), the Board proceeded to uphold the system under attack on the ground that "Operators of vessels in foreign commerce of the United States may at any time and without warning be subjected to severe competition by unregulated tramp vessels of any nation or by vessels chartered by shippers with large quantities of cargo to be

⁶ In *Swayne & Hoyt*, 300 U. S. 297 (1937), quoted at pp. 27-28, *supra*.

transported. * * * (id. at 291-292). Thus, the competitive factor in the trade was found to be governing.

In *Phelps Bros. & Co., Inc. v. Cosulich-Societa*, 1 U. S. M. C. 634 (1937) and *Sprague Steamship Agency, Inc. v. A/S Ivarans Rederi*, 2 U. S. M. C. 72 (1939), contract systems were attacked by competitive steamship companies who desired to enter the conferences and who had been excluded. The Board, after investigating the facts, upheld the contract systems provided the conferences should admit the complaining carriers to full and equal membership.

In *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948), the Board instituted a proceeding on its own motion to determine whether the conference agreement and amendments thereto, should be approved, cancelled or modified. The Antitrust Division of the Department of Justice intervened and urged that the agreement should be disapproved because the contract system practiced under the agreement was illegal. The Board concluded that some aspects of the contract system required revision but that the system, properly implemented, was essential in trade. The Board enumerated the factors which led to the conviction that the contract system was necessary (id. at 17):

"As against these objections, the same witnesses were practically unanimous in stating that their industries were interested in, yes; dependent upon transportation which was dependable and stable, and known rates sufficiently in advance so that future sales would be protected * * * since we sell on a C. I. F. basis we could seriously be disturbed by such fluctuations that might otherwise occur.' It was stated that the incident of the chartering of a vessel by a buyer in Europe was very disturbing to the trade because of the resulting tendency towards instabil-

ity of rates. It appeared that without some form of contract rate instability would unquestionably result. Such testimony from the very shippers who had objected to the contract rate, supporting, as it does, the testimony on behalf of the carriers in the trade and the disruption of the conference, is compelling. This trade is highly competitive, of a seasonal nature that lends itself to inviting outsiders to appear to get the profits and to disappear during the off season. The members of the conference had at no time denied membership to any applicant carrier. The contract rate system is a necessary practice in this trade to secure the continuance of the conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates."

The Board thereupon performed its legislative function, which a District Court in an antitrust suit could not have performed, in directing the changes which the Conference was required to effect as a condition for the continuance of a contract system.

The foregoing cases indicate that throughout the history of the Shipping Act, the Board has so interpreted that Act as not to render contract systems illegal *per se*. This course of interpretation is entitled to great weight upon the central issue of illegality.

In *United States v. Midwest Oil Co.*, 236 U. S. 459, 472-473 (1915), the following appears as the basis for this rule;

"2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthor-

ized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.”

We also refer to *Inland Waterways Corp. v. Young*, 309 U. S. 517, 524-525 (1940).

SECOND POINT.

THE STATUTORY LAW SUPPORTS PETITIONERS' CONTENTIONS THAT THE SHIPPING ACT, TO THE EXTENT OF THE MATTERS EMBRACED BY IT, HAS SUPERSEDED THE SHERMAN ACT; THAT THE BOARD HAS EXCLUSIVE JURISDICTION OF THE SUBJECT MATTER; AND THAT THE CONTRACT SYSTEM IS NOT ILLEGAL PER SE.

(a) The Shipping Act has *pro tanto* superseded the Sherman Act.

1. The provisions of the Shipping Act.

The philosophy of the Sherman Act is that the public good is served only by free and unfettered competition. In *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 491-493 (1940), this Court stated:

“It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of ‘trusts’ and of ‘combinations’ of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which

tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."

The Sherman Act was entirely prohibitory and restrictive in character. On the other hand, as pointed out in *United States Navigation*, 284 U. S. 474, 485 (1932), the Shipping Act grants privileges as well as imposes restrictions:

"The [Shipping] Act is restrictive in its operations upon some of the activities of common carriers by water, and permissive in respect of others. * * *"

It is instinct with the philosophy that in water transportation, free competition, rather than monopoly, is the evil to be avoided; but that specific evils in the use of the combined power of shipping conferences must be prohibited in the public interest. These evils are specifically catalogued in the Act. Over these shipping conferences there was set the powerful Board with all inclusive inquisitorial rights and with full jurisdiction to hear, determine and restrain. Moreover, the separate wrongs which the common carriers were enjoined to avoid are in every instance made either misdemeanors punishable by the imposition of heavy fines, imprisonment, or both; or are made punishable by heavy penalties. A study of these provisions is convincing that conduct prohibited by the Shipping Act as well as conduct permitted by that Act is eliminated from the scope of the Sherman Act.

The core of the Shipping Act is Section 15 (46 U. S. C. § 814) which is both restrictive and permissive, but predominantly permissive. That section requires common carriers by water to file with the Board every agreement with other common carriers "fixing or regulating transportation rates or fares;

giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The term "agreement" is thereupon defined as including "understandings, conferences, and other arrangements."

Then follows the provision giving the Board the power to act upon such agreements between common carriers. The language of the statute is:

"The * * * [Board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be *unjust y discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act]*, and shall approve all other agreements, modifications, or cancellations." (Italics supplied.)

The Board is thus vested with the power initially to determine whether any agreement submitted to it by common carriers is unjustly discriminatory between carriers, or operates to the detriment of the commerce of the United States, or is in violation of the Shipping Act. Irrespective of the action initially taken by the Board with respect to an agreement, it may at any time disapprove, cancel or modify an agreement which is found thus to be discriminatory, detrimental or illegal. The section provides that all agreements made after the organization of the Board "shall be lawful only when and as long as approved by the * * * [Board], and before approval or after disapproval it shall be unlawful to carry out in whole

or in part, directly or indirectly, any such agreement, modification, or cancellation."

Thus, Section 15 confers the aegis of legality upon such agreements which have received the Board's approval. With equal force and without reference to the Sherman Act or any other statute, it *condemns as illegal* any such agreement which shall not have received Board approval or which, once having been approved, shall thereafter be disapproved.

Then follows the provision which excepts all such agreements, lawful under Section 15, from the provisions of the antitrust laws. Characteristically, Section 15, which grants to common carriers by water the benefits of conference action, concludes with the monition:

"Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Section 15, then, is the charter under which conferences are formed for the accomplishment of the purposes specified in the section. The permitted purposes are the very antithesis of purposes which may be pursued by persons subject to the Sherman Act, *e. g.*, controlling, regulating, preventing or destroying competition.

The remainder of the regulatory portions of the Shipping Act have to do primarily with the detailed specification of conduct in which common carriers by water, acting either alone or in combination, are prohibited from indulging.

Section 14 (46 U. S. C. § 812) prohibits carriers from paying deferred rebates, from using fighting ships, from retaliating against shippers by refusing space accommodations, or by resort to other discrim-

inatory or unfair methods, from making unfair or unjustly discriminatory contracts with shippers based upon volume of freight offered and from discriminating against shippers in matters of cargo space accommodations, proper loading and discharge of cargoes and the adjustment of claims.⁷ Section 14 does not stop there, however. It provides that the carrier, who violates the section shall be guilty of a misdemeanor punishable by a fine of not more than \$25,000 for each offense.

Section 16 (46 U. S. C. § 815) declares that it shall be unlawful for any common carrier to give any undue or unreasonable preference to any person, locality or description of traffic, or to subject any person, locality or description of traffic to prejudice or disadvantage; to allow any person to obtain transportation of property at less than the regular rates by means of false billing, false classification and the like; or to induce any marine insurance company not to give a competing carrier as favorable hull or cargo insurance rates as those granted to the carrier. Section 16 does not, however, halt with the enumeration of these prohibitions. It provides that, whoever violates the section, shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense.

Section 17 (46 U. S. C. § 816) prohibits carriers from charging rates which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to American exporters as compared with their foreign competitors, and requires every carrier to establish reasonable regulations and practices relating to the receiving, handling, storing, or delivering of property. It empowers the Board to alter any rates, charges

⁷ Since the Attorney General bases his argument principally on Section 14, a more detailed analysis of that section will be found *infra*, pp. 63-71.

and the like to the extent necessary to correct discrimination and prejudice; to order the carrier to discontinue the discriminatory and prejudicial practice; and to prescribe just and reasonable regulations and practices with respect to receipt and delivery of cargo.

Sections 18 and 19 (46 U. S. C. §§ 817 and 818) deal exclusively with common carriers by water in interstate commerce. Section 20 (46 U. S. C. § 819) prohibits the disclosure of confidential information acquired by a common carrier. These sections are of no particular significance to this case.

Section 21 (46 U. S. C. § 820) enables the Board to require common carriers to file with it detailed data under oath concerning the carriers' business. This section gives the Board sweeping inquisitorial powers. It provides that anyone who shall fail to furnish the Board demanded information, shall forfeit to the United States the sum of \$100 for each day of default, and that anyone who wilfully falsifies any such report shall be guilty of a misdemeanor and punished by a fine of not more than \$1,000, or imprisonment for not more than one year, or both.

Section 22 (46 U. S. C. § 821) is the primary source of the Board's jurisdiction. It provides that the Board may act either upon its own motion or upon a sworn complaint filed by "any person" setting forth any violation of the Shipping Act by a common carrier by water. The section authorizes the Board to make such order as it deems proper.

Section 23 (46 U. S. C. § 822) provides for Board action only "after full hearing".

Section 24 (46 U. S. C. § 823) directs that the Board shall enter and publish a written report of every investigation made under the Act.

Sections 25 to 28 (46 U. S. C. §§ 824-827) contain further specifications of the manner in which the Board shall exercise its jurisdiction and powers, including provisions for the issuance of subpoenas, provisions with respect to self-incrimination, and the like.

Section 29 (46 U. S. C. § 828) contains a specific provision relative to the action which may be taken by the Attorney General. It is there provided that in case of a violation of any Board order other than one for the payment of reparations, the Attorney General may apply to a District Court to enforce obedience to the order by writ of injunction or other process, mandatory or otherwise.

Section 30 (46 U. S. C. § 829) provides for the enforcement of a Board order for the payment of reparations, and Section 31 (46 U. S. C. § 830) prescribes the venue and procedure in suits brought to enforce, suspend, or set aside Board orders.

Apparently, fearing that some violator of the Act may not have had his just punishment prescribed in the preceding sections, the Congress inserted the omnibus Section 32 (46 U. S. C. § 831):

"Whoever violates any provision of this chapter [Act], except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by a fine not to exceed \$5,000."

Thus, the Shipping Act provided not only a completely new substantive statutory law of shipping, but a complete system of remedial and retributive justice applicable thereto. We urge that, on the basis of the affirmative provisions of the Shipping Act, not a shred of the Sherman Act remains applicable to any of the activities of common carriers by water which are dealt with in this legislation.

We concede that all of the members of a conference would be amenable to Sherman Act prosecution

if they should conspire with industrial or commercial shippers so as to restrain trade or produce a monopoly in the fields of commerce or industry in which such shippers might be engaged. The basis of liability in such case is delineated in *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U. S. 500, 515-516 (1936), as follows:

"In thus holding we do not intimate that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages. This has been made plain already. We enlarge on it for greater certainty. Wherein the case is now deficient will be made clearer by example. One may suppose a business of a manufacturer which has assumed the form and size of a monopoly, or if not already at that stage, is well upon the road thereto. * * * [citing cases] One may add a situation in which a carrier has knowingly confederated with the owner to preserve such a business or foster it. Whatever liability grows out of that alliance is untouched by this decision. For present purposes we may assume that if such a situation should develop, the carrier would make itself a participant in the monopoly which it had conspired to produce, though its only overt act was a discriminatory rate of carriage. Again, a group of manufacturers, whose business in combination would not amount to a monopoly, might unite among themselves to lay a burden upon commerce by concerted action as to prices. * * * [citing cases] If a carrier were to give a preference in furtherance of that conspiracy, it would become a participant therein, or so we may assume, the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity."

To such an extent, it is true, that the mere circumstance that common carriers in foreign commerce are subject to regulation by an administrative body, does not exempt them from antitrust prosecution. Cf. *United States v. Borden Co.*, 308 U. S. 188 (1939). Nonetheless, we submit that it is clear from the foregoing analysis of the Shipping Act that any action by a conference or its members which may be unfairly or unduly prejudicial to the rights of shippers or of competitors in the field of shipping, constitutes a violation of the Shipping Act and not of the Sherman Act, with the purposes of which it is diametrically in conflict.

2. The Shipping Act considered in the light of other legislation.

Under the preceding head we hope that we have demonstrated that the provisions which the Congress did incorporate into the Shipping Act strongly evince the legislative purpose to supplant the Sherman Act by the Shipping Act so far as concerns any question relative to competition in the shipping industry. Petitioners here put forward the view that the Shipping Act is as eloquent in their favor by reason of provisions which the Congress *did not* incorporate in the Shipping Act. This we propose to do by considering the provisions of the Shipping Act in their relations to, or in contrast with, provisions of other statutes.

(i) *Comparison With the Interstate Commerce Act.*

It is noteworthy that the Shipping Act has been analogized to the Interstate Commerce Act (*United States Navigation*, 284 U. S. 474, 480-481. (1932)). Section 9 of the Interstate Commerce Act (49 U. S. C. § 9) provides, so far as here material:

“Any person or persons claiming to be damaged by any common carrier subject to the provisions

of this chapter [Act] may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter [Act] in any District Court of the United States of competent jurisdiction * * *."

Section 22 of the Interstate Commerce Act (49 U. S. C. § 22) provides, so far as here material:

"nothing in this chapter [Act] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter [Act] are in addition to such remedies * * *."

The Shipping Act contains no grant of jurisdiction to the District Courts over matters coming within the scope of the Shipping Act except possibly in suits for the punishment of crimes or the recovery of penalties for the commission of acts prohibited by the Shipping Act. Nor does the Shipping Act save any remedies, common law or statutory, which were in existence at the time of the enactment of the law. In view of the similarity of the general purposes of the Shipping Act and the Interstate Commerce Act, we submit that these omissions are significant of a Congressional purpose to vest exclusive primary jurisdiction in the Board over all controversies which involve a violation of the Shipping Act.

A comparison of the provisions of the Shipping Act with similar provisions of the Interstate Commerce Act, as amended by the Transportation Act of 1940, is even more illuminating.

Section 5(1) of the Interstate Commerce Act (49 U. S. C. § 5(1)) declares that it shall be unlawful for any rail, motor or water carrier subject to that Act to enter into agreements with like carriers for the pooling

or division of traffic or of service or of earnings, unless the Commission approves such agreements. However, before the Commission may approve such agreements, it must find that they "will not unduly restrain competition". Furthermore, Section 5(2) (49 U. S. C. § 5(2)) declares lawful certain mergers and consolidations between carriers after the Commission has approved the same. However, the Commission is admonished not to enter an order approving a consolidation between a railroad and a motor carrier unless it finds that the transaction proposed "will not unduly restrain competition". Subdivision 11 of Section 5 (49 U. S. C. § 5(11)) exempts carriers who participate in transactions approved or authorized under the provisions of Section 5, from the operations of the antitrust laws.

The Interstate Commerce Act, as thus amended, has certain features in common with the Shipping Act in that both statutes authorize cooperative action among competing carriers. It is, however, significant of the congressional purpose to free the activities of common carriers by water in foreign commerce from the operation of the Sherman Act that, whereas, in the statute regulating interstate transportation, a condition precedent to much of the lawful cooperation is that the Interstate Commerce Commission must find that the agreement does not "unduly restrain competition", the Shipping Act does not place any similar injunction or limitation upon the Board acting under Section 15 of the Shipping Act.

In *McLean Trucking Co. v. United States*, 321 U. S. 67, 87-88 (1944)—a case involving an interpretation of the Interstate Commerce Act as amended by the Transportation Act of 1940—the Court stressed that the Congress left to the Commission the task of balancing the advantages of improved service, safer operation, lower costs, and the like, against the effects

of curtailment of competition. In this context, the Court said:

"In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' * * *"

We submit that it would be paradoxical to invoke the wisdom and experience of the Commission and not of the courts in respect to a statute which specifically imports the concept of free competition and to permit similar issues to be determined by a District Court in an antitrust suit against carriers cooperating under a statute which does not even mention free competition.

(ii) *Section 16 of the Clayton Act.*

Section 16 of the Clayton Act (15 U. S. C. §26) specifically gives to "Any person, firm, corporation, or association" injured by a violation of the antitrust laws, the right to sue for injunctive relief. Section 16, however, contains the proviso that no person, firm,

corporation, or association, *except the United States*, shall have the right to bring a suit for injunctive relief "against any common carrier, subject to the provisions of Chapters 1 and 8 of Title 49, in respect of any matter subject to regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

This legislation was enacted on October 15, 1914, less than two years prior to the adoption of the Shipping Act on September 7, 1916. Upon the adoption of the Shipping Act, the Congress neither amended Section 16 so as to bring ocean carriers within the purview of its proviso nor incorporated into the Shipping Act any provision having like effect. Since the adoption of the Shipping Act, both that Act and the Clayton Act have been frequently amended. Nonetheless, the proviso in Section 16 stands today as originally enacted.

It results that, although carriers subject to the Interstate Commerce Act are by statute made subject to one rule when a suit in equity under the Sherman Act is instituted against them by the Government, and another rule when a similar suit is instituted against them by a private litigant, no such distinction has ever been imported into the statutory law with respect to carriers by water in foreign commerce.

Hence, this statute cannot explain even inferentially the Court's refusal in *United States Navigation*, 284 U. S. 474 (1932), to approve of the maintenance of an antitrust action by a private litigant against a steamship conference. Indeed, the comparative history of Section 16 of the Clayton Act and of the Shipping Act constitutes persuasive evidence of the congressional purpose that both Government and private litigant should be dealt with on the authority of *United States Navigation*.

(b) The Shipping Act does not outlaw conference contract systems.

The argument in support of the contention that the Shipping Act renders the contract system illegal *per se* is predicated upon the hypothesis that the maintenance of such system prevents or destroys competition between the conference and non-conference lines and, therefore, Board approval of the system under Section 15 (46 U. S. C. § 814) cannot be given; and, further, that Section 14 (46 U. S. C. § 812), subdivision Third of the Shipping Act, specifically bans the contract system. Persuasive argument against those contentions has already been put forward in the briefs submitted by appellants in Nos. 134 and 135. We adopt what has there been said and shall attempt to avoid repetition. Additional conclusive demonstration, we submit, is to be found in the statute itself.

Section 15 authorizes the Board to approve an agreement among common carriers "controlling, regulating, preventing, or destroying competition." The Attorney General would read into this plain and unequivocal language the qualification that the only kind of competition which may be prevented or destroyed is competition among the members of the conference. Section 15 contains no such qualification. On the other hand we submit that it contains internal evidence that it authorizes the Board to approve agreements which would prevent or destroy competition between conference lines and non-conference lines.

In the first place, it is to be noted that the section authorizes conferences to fix or regulate transportation rates or fares, and to pool or apportion earnings or traffic and to allot ports and restrict sailings and to limit and regulate the character of freight to be carried. Here, we find specific provisions which, without more, prevent or destroy competition among the conference lines. If the authorization of Section

15 had not been drafted for the purpose of permitting the prevention or destruction of competition with outside lines, the language relative to such prevention and destruction would have been mere surplusage.

But even more unmistakable evidence of such purpose is that Section 15 provides that the Board may, by order, disapprove, cancel or modify any agreement "whether or not previously approved by it, that it finds to be *unjustly discriminatory or unfair as between carriers*, shippers, exporters, importers or ports * * *"(Italics supplied). Section 15, therefore, contemplates that conference agreements may be discriminatory as between carriers; and such agreements have the blessing of Section 15 unless they are unjustly discriminatory. We take it to be obvious that conference members would be most unlikely to enter into a conference agreement which is discriminatory among themselves. This provision, therefore, leads inescapably to the conclusion that the Congress contemplated that there would be conference agreements which would be discriminatory against non-conference lines. The non-conference lines have the remedy of seeking the disapproval or cancellation of the conference agreement if it proved to be unjustly discriminatory. This argument is fortified by the fact that "shippers, exporters, importers or ports", discrimination against whom would also result in the cancellation of a conference agreement, are obviously not members of the conference.

In *Phelps Bros.*, 1 U. S. M. C. 634 (1937), and in *Sprague Steamship Agency*, 2 U. S. M. C. 72 (1939), non-conference lines, seeking membership in conferences maintaining contract systems, attacked conference agreements as being unduly discriminatory as against them. In each case the Board ruled that it would give consideration to an order disapproving the conference agreement under Section 15 unless the applicant were promptly admitted to equal member-

ship. Our research has disclosed no case in which any carrier has ever attacked a conference of which it was a member as being discriminatory against it.

Further force is lent to this contention by a comparison between the provisions of Section 15 and those of Section 14. We find that Section 14, subdivision First, prohibits common carriers by water *to enter into agreements* to pay or allow a deferred rebate, and that Section 14, subdivision Second, prohibits a common carrier by water, *in conjunction with any other carrier through agreement or otherwise*, to use a fighting ship. If any conference practices can be utterly destructive of non-conference competition, they are the deferred rebate and the fighting ship. If Section 15 were not intended to authorize common carriers to enter into agreements which would have the effect of preventing or destroying competition, then the first and second subdivisions of Section 14 would have been limited in their prohibitions to common carriers acting independently. There would then have been no occasion to prohibit carriers acting pursuant to an agreement from using the deferred rebate and the fighting ship, for it is only pursuant to Section 15 that two or more common carriers may act under agreements among themselves. The interpretation which the Attorney General would ascribe to Section 15, therefore, renders surplusage the provisions of subdivisions First and Second of Section 14, to the extent that they apply to combined action of carriers.

Section 14, however, contains even stronger internal evidence that it was not intended to outlaw the contract system. It has been noted that subdivision First makes illegal the payment of a *deferred* rebate to any shipper as a consideration for giving all or any portion of his shipments to the same or any other carrier, and is at pains to define the meaning of the deferment. It

is clear that Section 14 does not outlaw *all* rebates, in consideration of exclusive patronage.

If Section 14 contemplates that carriers may, with the approval of the Board, pay *current* rebates for exclusive patronage, it would involve an anomaly to give any portion of that section an interpretation which would render it illegal for the carriers, in the first instance, to charge to the shippers the net amounts of freight which it is intended that they should pay in consideration for exclusive patronage. If, on the other hand, subdivision Third should be construed to outlaw the current payment of rebates; then it should, *a fortiori*, be held to outlaw the payment of deferred rebates. Such construction would render surplusage the whole of subdivision First.

Section 14 is highly penal. Violation is made a misdemeanor, punishable by a fine of not more than \$25,000 for each offense. This is the greatest money penalty prescribed in any of the sections of the Shipping Act. If the contention of the Attorney General that a violation of Section 14 also involves a violation of the Sherman Act were correct, then the civil and criminal penalties and forfeitures of the Sherman Act would be heaped upon the fines prescribed by Section 14. It is axiomatic that penal statutes must be narrowly construed so as not to bring within their purview any acts not specified by the language employed by the legislature.

The rule was thus stated in *United States v. Resnick*, 299 U. S. 207, 209 (1936), as follows:

"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. * * *"

We submit that a common business practice such as the contract system should not be held to constitute

a crime unless the statute defining the crime clearly so requires.

Similarly, although subdivisions First and Second explicitly provide that the practices of the deferred rebate and of the fighting ship may not be indulged in by carriers acting under agreements, subdivision Third, which is pointed to as dealing with the contract system, does not purport to regulate the conduct of carriers acting under agreements. Nor is this defect supplied by the insertion of the words "directly or indirectly" in the introductory paragraph of Section 14. Those words apply to subdivisions First and Second as well as to subdivision Third. Conference action is not the indirect action of the conference members. It is group action, but it is direct action, unless performed through an intermediary. To apply subdivision Third to conference action, therefore, would again be tantamount to an expansion of this crime-defining section to cover offenses not clearly within its purview.

Nor will the argument that subdivision Third of Section 14 contains language appropriate to accomplishing the outlawing of the contract system bear scrutiny. The Court will note that subdivision First of Section 14 outlaws *per se* the payment of deferred rebates and defines the deferred rebate in terms of such clarity as legislation seldom attains. It will also be observed that subdivision Second of Section 14 outlaws the fighting ship and defines the term "fighting ship" in such unequivocal language that a school child can understand it. Yet, the Attorney General urges a view which can be supported only on the hypothesis that the same legislative draftsmen suddenly became completely inarticulate in drafting subdivision Third, and used the most appropriate language of subdivision Third to express an intent to outlaw *per se* the contract system. Subdivision Third,

together with the introductory portion of Section 14, reads as follows:

"No common carrier by water shall, directly or indirectly, * * *

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

The word "contract" cannot be found in this subsection. The complaint does not allege that the contract system constitutes retaliation by refusing, or threatening to refuse, space accommodations, when available. The Attorney General is, therefore, relegated to the argument that the contract system constitutes a "resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * *."

The contract system cannot be looked upon as a discriminating or unfair method practiced because the shipper has patronized any other carrier. Conference freight contracts are equally available to shippers who have, and to those who have not, shipped by outside lines. The contract rate is afforded to the contract shipper not because he has in the past refused to patronize outside lines, but because he has entered into the contract entitling him to those rates. A shipper who has consistently shipped by outside lines may enter into the freight contract and he will receive the contract rate with respect to the first shipment that he makes thereunder.

It has been argued, however, that the effect of retaliation and of discrimination and unfairness is accomplished by the terms of the conference freight

contract. It is argued that the contract holds over the shipper the threat that if, having agreed to ship by conference vessels, he should make any shipments by a non-conference line, he will thereafter be penalized by being required to pay at non-contract rates or by being subjected to some other unfair and unjust treatment. Of course, it might be possible to draft a conference freight contract that the contract shipper might be made to suffer unduly from a breach of his contract. Indeed, we are not too proud of the liquidated damage clause contained in the 1945 form of the Far East Trade Agreement, a copy of which is Exhibit B annexed to the complaint (Par. 33, R. 6; R. 16). However, the Board, as the guardian of the shippers' interests, has long ago disapproved of such form of liquidated damage clause.

In *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948), the Conference had proposed a form of liquidated damage clause, perhaps even more drastic than that included in the 1945 form of the Far East Conference. During the course of the hearing, the Conference had proposed to amend the clause. Both the original and the amended clause appear at page 18 of the report. Both of them were subject to the objection that in case of violation by the shipper, the contract itself would become null and void as to future shipments and would require the shipper to pay at non-contract rates for all shipments made by him during a period prior to the date of violation. The Board disapproved both of these forms and suggested the appropriate basis for a liquidated damage clause (*id.* at 18-19):

"The first and second objectionable features are thereby eliminated. The retroactive feature, however, is retained. This feature is open to criticism because of the unequal manner in which it would operate. A shipper in large volume and of great frequency finds himself in such a posi-

tion that the amount which he would have to pay, if he used an occasional carrier, would be such as to compel him to use the conference carriers permanently, whereas the infrequent shipper or one who ships in very small volume would not be deterred by reason of the penalty. The purposes of the clause—to reimburse the carriers for losses suffered by violation of the contract and to prevent breaches in the future—have not been attained.

“Conferences have long been confronted with the problem of damages with respect to possible breaches of the conference agreement by its members, and in many cases have fixed the damages to be paid, where the breach has involved the cutting of rates at the amount of the freight involved or at a certain number of times thereof. This establishes a definite formula by which the penalty can be calculated and has no retroactive feature. Respondents will be expected to amend the liquidated damages clause of their contract somewhat along the lines indicated herein.”

If a violation by the shipper of his conference freight agreement does not entail the future payment of the non-contract rate, and has as its only consequence the assessment of damages computed on a compensatory and non-punitive scale, there can be no basis for the contention that the contract system constitutes a threat of retaliation or a retaliation in the future. Thus, it appears that a specially trained regulatory agency is equipped to and can prevent any abuse of the contract system which might even metaphorically be referred to as retaliatory or discriminatory.

The Attorney General may further point out that the phrase “discriminating or unfair methods” used in subdivision Third of Section 14, is not qualified by any such word as “unduly”, “unjustly”, “un-

fairly", or "unreasonably". Enough has appeared to indicate that petitioners' contention is that it is more or less a matter of indifference whether these modifying adverbs be or be not implied, for the reason that an appropriate form of freight contract would provide for mere compensation in case of breach, so that there would be no discrimination of any kind. Be that as it may, the words "or unfair" which follow the word "discriminating" undoubtedly introduce the same overtone of meaning to the word "discriminating". Such, apparently, was the view of this Court in deciding *Swayne & Hoyt*, 300 U. S. 297, 304 (1937), for, in laying down the basis of the judgment which the Board must exercise with respect to contract systems, the following language was used:

*"In determining whether the present discrimination was undue or unreasonable * * * [the Board] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter."* (Italics supplied.)

United States v. Wells-Fargo Express Co., 161 F. 606, 610 (C. C. N. D. Ill. 1908), establishes the proposition that the unqualified word "discrimination" imports the concept of undue or unjust discrimination. The defendant was prosecuted for discrimination in violation of certain sections of the Interstate Commerce Act, among them Section 1 of the Elkins Act (49 U. S. C. § 41). In commenting on the absence of an adjective modifying the term "discrimination", the Court said:

"Amended section 1 of the so-called Elkins act differs from sections 2 and 3 of the original act,

among other matters, in this: That the word 'discrimination' is used in the former without any qualifying adjective, as 'unjust,' etc. It is contended by the government that this omission discloses the intention, on the part of Congress 'to require common carriers in interstate commerce to publish and file schedules of rates, to adhere absolutely to such rates, and to grant no preferences or discriminations unless expressly authorized by the statute.' It may be doubted whether Congress intended by this language to broaden the prohibitions of the act in that respect. It is difficult to conceive of the terms 'discrimination,' 'prejudice,' or 'disadvantage' as not associated with what is unjust, unreasonable, and undue. It is true the adjectives are dwelt upon in the former decisions of the court with considerable emphasis. It hardly seems, however, as though their absence would have modified the opinion rendered in these cases. Webster defines the word 'discrimination,' with reference to railroads, as 'the arbitrary imposition of unequal tariff for substantially the same service,' investing it with the sense of unjustness and unfairness. So far as appears, the Supreme Court has not had its attention called to the change, and has given it no construction."

The judgment of the District Court was affirmed in *American Express Co. v. United States*, 212 U. S. 522 (1909). That the Court specifically ruled on this question is shown in the following quotation (*id.* at 531-532):

"The provisions of the Elkins act to which we have referred have been the subject of consideration in recent cases before this court. * * * [citing cases] It is unnecessary to repeat the discussion had in those cases as to the prior legislation and the reasons of public policy which led up to the enactment of the sections of the Elkins act above

quoted. It is enough to say that it was the purpose of this law to require the publication and posting of tariff rates, open to public inspection, and at the service of all shippers alike; to prohibit and punish secret departures from the published rates, and to prevent and punish rebating, preferences and all acts of *undue discrimination*. * * * (Italics supplied.)

Other cases to the effect that the concept of discrimination is meaningless unless it is limited to that conduct which is unjust, unfair, and unreasonable are: *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495 (1937) (due process and equal protection under the 14th Amendment); *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 F. 407, 416-419 (5th Cir. 1898); *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 F. 576, 626-634 (C. C. W. 1889), *app. dismiss. per cur.*, 149 U. S. 777 (1893) (interpreting Sec. 3 of the Interstate Commerce Act, 49 U. S. C. § 3); but *cf.* *Baltimore & O. R. Co. v. United States*, 22 F. Supp. 533, 538 (N. D. N. Y. 1937); and *Cumberland Telephone & Telegraph Co. v. Kelly*, 160 F. 316, 319-320 (6th Cir. 1908); *Harp v. Choctaw, O. & G. R. Co.*, 125 F. 445, 453-454 (8th Cir. 1903); *Yancey v. Batesville Telephone Co.*, 81 Ark. 486, 494-495 (1907) (interpreting state statutes). This principle prevailed at common law: *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 99-100 (1901); *Root v. The Long Island Railroad Co.*, 114 N. Y. 300, 304-305 (1889).

A study of the entire Shipping Act, we submit, compels the conclusion that Section 14 is not at all the statutory provision which applies to the contract system. Rather, it is Section 17 (46 U. S. C. § 816). This section provides that:

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate,

fare, or charge which is unjustly discriminatory between shippers * * *."

Section 17 thereupon vests in the Board specific authority "to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge." Hence, the section gives to the Board complete power to bring a contract system in any foreign trade to an end or to correct its operation so as to eliminate objectionable features.

An analysis of the relevant statutory material, therefore, demonstrates that the contract system is not illegal *per se*, that the exclusive power to pass upon the validity of contract systems is vested in the Board, that no cause of action under the Sherman Act can be predicated upon the maintenance of a contract system, and that the District Court has no jurisdiction to determine the validity or propriety of a contract system in a suit instituted under the Sherman Act.

THIRD POINT.

THE LEGISLATIVE HISTORY OF THE SHIPPING ACT SUPPORTS THE INTERPRETATION WHICH WE URGE.

The legislative history of the Shipping Act, we submit, removes any possible doubt that the interpretation for which petitioners contend is the only permissible one.

(a) The background of the Alexander Committee investigation.

The Shipping Act resulted from an investigation conducted by the Committee on the Merchant Marine and Fisheries of the House of Representatives. The

Chairman of this Committee was, Representative Alexander, of Missouri. The Committee is accordingly commonly referred to as the Alexander Committee. The Alexander Committee conducted its investigation under successive resolutions adopted, respectively, on February 24, 1912, and June 18, 1912, (H. Res. 425, 62d Congress, 2d Session and H. Res. 587, 62d Congress, 2d Session).⁸

Prior to the adoption of the former of these two resolutions, two antitrust actions had been instituted against steamship conferences—*Thomsen v. Union Castle Mail S. S. Co.*, 149 F. 933 (C. C. S. D. N. Y. 1907); *rev'd*, 166 F. 251 (2d Cir. 1908); retried (case not reported); *rev'd sub nom.*, *Union Castle Mail S. S. Co. v. Thomsen*, 190 F. 536 (2d Cir. 1911); *rehearing* 190 F. 1022 (2d Cir. 1911); *rev'd sub nom.*, *Thomsen v. Cayser*, 243 U. S. 66 (1917), in which shippers sued the members of the conference in the South African trade under Section 7 of the Sherman Act (15 U. S. C. § 15) to recover treble damages, and *United States v. Hamburg-American S. S. Line*, 216 F. 971 (S. D. N. Y. 1914); *rev'd as moot*, 239 U. S. 466 (1915), in which the United States instituted an antitrust suit against the conference in the Transatlantic trade. Before the adoption of the second of the two resolutions authorizing the Alexander Committee investigation, two additional antitrust suits had been instituted by the United States against the conferences in the South American trade and the Far East trade, respectively—*United States v. Prince Line*, 220 F. 230 (S. D. N. Y. 1915); *rev'd as moot*, 242 U. S. 537 (1917) and *United States v. American-Asiatic Co.*, 220 F. 230, 235 (S. D. N. Y. 1915); *rev'd as moot*, 242 U. S. 537 (1917). In essence, these actions charged that the conferences paid deferred rebates, employed fighting ships, and the like.

⁸ For citation of these resolutions, please refer to footnote No. 9 at page 74.

The Conferences defended upon the ground that the economic factors peculiarly affecting ocean transportation, justified these practices and, hence, they were not in violation of the Sherman Act.

A mere reading of the enabling resolutions carries conviction that the House acted on the assumption that shipping conferences were violative of the best interests of the commerce of the United States; but that the House was uncertain whether such conferences violated the Sherman Act or any other law of the United States. Under the authority of these resolutions, the Alexander Committee conducted a searching scrutiny of the entire subject for a period of almost two years. The Report of this Committee stands as a landmark in the shipping history of the United States.⁹

Lest there be any doubt as to the legislative climate in which the Alexander Committee operated, it should be remembered that the major portion of its labors was performed during the life of the Congress which adopted the Clayton Act. Moreover, all of the Court decisions (excepting the District Court decision upon the second trial of *Thomsen v. Union Castle Mail S. S. Co., sub nom., Thomsen v. Cayser* (not reported, and reversed in 190 F. 536 (2d Cir. (1911))), rendered in the antitrust cases above referred to prior to the adoption of the Shipping Act, had held that the Sher-

⁹ This Report and the evidence upon which it was predicated were printed in four volumes entitled, *Investigation of Shipping Combinations Under House Resolution 587* (Government Printing Office 1913). Matters appearing in these volumes will be referred to by the number of the volume in which the respective matters appear and the pages at which they appear, e.g., 1 Alexander Rep. 20. The resolutions authorizing the investigations will be found at 4 Alexander Rep. 8-10. Volume 4 of the Report, to which most of our citations refer, is embodied in H. R. Doc. 805, 63d Cong., 2d Sess. (1914) and the page references to 4 Alexander Rep. are identical with those in H. R. Doc. 805.

man Act did not condemn the Conference's practices.¹⁰ It, therefore, might have been expected that the Committee would recommend either a broadening of the Sherman Act so as to condemn conference action beyond peradventure, or would recommend the adoption of a separate law having similar effect.

The Alexander Committee called numerous witnesses, examined a great volume of conference agreements and other documents and data, circularized shippers with questionnaires, wrote to official representatives of the United States abroad, and pursued, indeed, every avenue for the securing of relevant in-

¹⁰ *Thomsen v. Caysen* reached this Court for argument in April, 1914, was restored to the docket for reargument in June, 1915, was reargued in January, 1917, and decided in March, 1917. The decision of this Court was that the conduct by the defendant carriers did violate the Sherman Act. The case came up, however, after a peculiar judicial history. At the first trial, the District Court dismissed the complaint at the close of the plaintiff's case on the ground that no violation of the Sherman Act had been proved (149 F. 933). The judgment of dismissal was reversed by the Circuit Court of Appeals, 2d Circuit (166 F. 251), on the ground that no question of the reasonableness of the practice was involved. The case was sent back for a new trial. Upon the second trial, a judgment was entered in favor of the plaintiffs. All questions of the economic justification for the practice of the conference was excluded because of the ruling of the Circuit Court of Appeals. The conference appealed to the Circuit Court of Appeals, which again reversed on the ground that, because of the decisions of this Court in the *Standard Oil* (221 U. S. 1 (1911)) and *Tobacco* (221 U. S. 106 (1911)) cases, the construction placed upon the Sherman Act upon the first appeal had been erroneous. The Circuit Court of Appeals thereupon ordered a third trial. The plaintiffs asked for a rehearing. They argued that they should not be required to try the case again and filed a consent that upon the reversal of the judgment of the District Court, the complaint should be ordered dismissed. Briefs of conference counsel indicate that the defendants protested that to follow such course would deprive them of the privilege of placing in the record evidence of the justification for the use of the deferred rebate system, the fighting ship and the like. Nonetheless, the Circuit Court of Appeals, upon the rehearing, handed down a mandate requiring a dismissal of the complaint. The case, therefore, came before this Court upon what seems to have been a fragmentary record.

formation. Furthermore, the Committee had before it, and gave full consideration to, the testimony and exhibits in the antitrust cases above referred to, as well as the Report of the Royal Commission appointed by the British Government in 1906 to investigate so-called shipping rings (4 Alexander Rep. 2-6).¹¹

As a result of this investigation, the Alexander Committee recommended that the interests of American commerce as well as of the shipping industry could not be served by a prohibition of conference action but rather by a legalization of conferences which should comply with certain statutory requirements, which should be approved by the administrative agency set up for that purpose, and which should at all times be subject to public scrutiny; and by a proscription of certain invidious practices precisely defined in which conferences had in the past indulged.

(b) Peculiar economic factors affecting ocean transportation.

One of the chief factors which apparently influenced the Alexander Committee in reaching its conclusions was the distinction which it found between economic conditions affecting foreign ocean carriers and those affecting domestic and particularly rail carriers.

One distinction is that ocean liner services are at all times subject without notice to competition in the carriage of bulk commodities by tramp ships from the great reservoir of vessels in the world charter market (4 Alexander Rep. 309).

¹¹ The Reports of the Royal Commission are entitled, "Reports from Commissioners, Inspectors, and Others: 1909; Cd. 4668-4670". Further material upon this subject may be found in the Final Report of the Imperial Shipping Committee on the Deferred Rebate System, Cmd. 1802, published in 1923. This later Report, of course, was not before the Alexander Committee.

The second point of contrast is that the unit of transportation by water is inflexible, *i. e.*, the total capacity of the ship; whereas, in rail transportation, it is possible to lengthen or shorten trains as the traffic requires (4 Alexander Rep. 310).

A third distinguishing feature is that steamships, not operating over fixed rights of way pursuant to governmentally granted franchises, have charter values so that, unless liner freights can be kept at a reasonably stable level of compensatory rates, the vessels will be lured from one trade to another, according to the fluctuations of the charter market in various parts of the world (4 Alexander Rep. 310-311).

Finally, the Committee found that ocean liners must have much greater freedom than railroads to change rates rapidly in order that the lines may afford to American exporters rates which will enable them to compete with their foreign competitors in a common market (4 Alexander Rep. 309).

It may be stated in passing that the Royal Commission reported (Reports from Commissioners, Inspectors, and Others: 1909; Cd. 4668 at pp. 48-49) and this report was substantiated by the evidence before the Alexander Committee (2 Alexander Rep. 1363) that a further distinction exists, *i. e.*, that a competitive liner service may be instituted at any moment without the investment of any substantial amount of capital, merely by securing tonnage in the charter market. Of course, no such consideration applies to rail carriers.

(c) It was the legislative purpose that the Shipping Act should *pro tanto* supersede the Sherman Act.

A study of the Alexander Committee Report is persuasive that because of the foregoing as well as other considerations, it was the purpose of the Shipping Act to remove the shipping industry from the

scope of the Sherman Act and to repose in the Board exclusive jurisdiction to prohibit acts which constitute a violation of the Shipping Act.

The Committee considered the effect of conference action upon the economic life of the nation and, we believe to its surprise, found it good. It set forth in its Report (4 Alexander Rep. 295-303), in elaborate summary, a statement of the benefits which were claimed to arise from conference action. It would be impossible here to condense this important summary but we believe that a synopsis of these advantages is here appropriate:

- (1) A substantial increase in sailing opportunities.
- (2) Fixed and dependable dates of sailing at regular intervals.
- (3) Stability of freight rates over long periods of time, with the result, among others, that the American exporter is enabled to quote prices and make contracts for future delivery in competition with foreign merchants, without fear that instability or violent fluctuations in freight rates will introduce a speculative element into his bargain.
- (4) Conferences are impelled by self interest to establish rates which will enable their American shippers to compete successfully with foreign merchants in the common market.
- (5) Uniform freight rates made available to all shippers irrespective of size, economic power or volume of shipments.
- (6) Prevention of the elimination of weaker steamship lines.
- (7) Maintenance of proper relationships between freight rates from various sources of supply.

(e. g., America, United Kingdom and Continent) to common foreign markets.

The Committee, however, also pointed out evils which had arisen in conference operation (4 Alexander Rep. 304-307). These evils consisted of abuses in which the conferences might at one time or another have indulged, but which were susceptible of correction by appropriate regulation.

Considering all of the foregoing, the Committee concluded that the real ill to which the shipping industry is subject is not the malady of monopoly and restraints on competition, but the affliction involved in cutthroat competition and rate wars. Having enumerated the advantages and considered the disadvantages of conference action, the Committee continued (4 Alexander Rep. 416-417):

"These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. *The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade.* Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common owner-*

ship. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. *Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.*" (Italics supplied.)¹²

Thus, the Committee voiced its opposition to the application of the antitrust philosophy to the steamship business. The Committee, of course, was obliged to find the substitute for the antitrust approach. This it did in its recommendations (4 Alexander Rep. 418) as follows:

"The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective Government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of." (Italics supplied.)

The Committee, in the first instance, considered the vesting of the regulatory power in the Interstate

¹² Conferences operating between the United Kingdom and the Far East may legally employ the deferred rebate system and use fighting ships as methods for maintaining stability of freight rates. *Mogul Steamship Co. v. McGregor*, 21 Q. B. D. 544, 548 (1888); aff'd. in the House of Lords, 1892 A. C. 25.

Commerce Commission. The fifth recommendation of the Committee evinces the purpose both to give to the Commission full power to adjudicate and dispose of issues such as are here presented (4 Alexander Rep. 421).

"(5) That the Interstate Commerce Commission be empowered to investigate fully all complaints (*or to undertake such investigation on its own initiative*) charging (1) failure on the part of any carrier to give reasonable notice of increase in rates, (2) unfair treatment of shippers in the matter of cargo space and other facilities, (3) the existence of discriminating or unfair contracts with certain shippers, and (4) unfairness in the settlement of claims and indifference to the landing of freight in proper condition. In this connection *the Commission should be empowered to order the discontinuance of all unfair or discriminating practices which it may find to exist, and to adopt whatever measures it may deem necessary to protect the complainant against retaliation.*" (Italics supplied.)

The purpose to supersede the Sherman Act by the new legislation appeared even more clearly from the language of the Committee members on the floor of the House, when that body had resolved itself into the Committee of the whole for the purpose of debating H. R. 15455 which, with amendments not here relevant, finally was enacted as the Shipping Act.

Representative Burke, of Wisconsin, who was a member of the Committee which had reported the Bill, took the floor and rendered a long report explaining the purposes thereof (53 Cong. Rec. 8089). In discussing the "Ship-Trust Investigation", Mr. Burke stated (53 Cong. Rec. 8095):

"This investigation disclosed the unfair practices resorted to by water carriers for the pur-

pose of destroying competition, and of discriminating and retaliating against persons and places who would not tamely submit to their dictation. It was found that, almost without exception, all of the merchant marine engaged in our foreign commerce resorted to the unfair practices known as deferred rebates, fighting ships, retaliation, and the making of unjust and discriminatory contracts relative to space accommodations, and with respect to loading and handling of freight in proper condition, and also with respect to the adjustment and settlement of claims. These practices were bitterly complained of by shippers and business men for years, *but there was no law to be found upon the statute books providing punishment for such offenses or relief from such practices.* Numerous other unfair practices in the business of transportation by water common carriers were found." (Italics supplied.)

To similar effect was a statement made on the floor by Chairman Alexander (53 Cong. Rec. 8077).

The language of the Committee Report and the statements of the Committee members above quoted carry conviction that it was the purpose of the Shipping Act to set up the rights and remedies which it provided as the sole substantive and adjective provisions of our statutory law affecting competition among common carriers by water in our foreign commerce.

(d) It was not the legislative purpose to render the contract system illegal *per se*.

We have observed that the cornerstone of the Attorney General's argument with respect to the essential illegality of the contract system is his contention that Section 15 of the Shipping Act (46 U. S. C. § 814) does not authorize conferences to enter into

agreements which prevent or destroy competition with non-conference lines. His argument is that only competition among the conference lines may be affected by agreements under Section 15. The legislative history of the Act demonstrates that this argument is ill-founded.

The Alexander Committee's recommendations (4 Alexander Rep. 415) make it clear that many of the conferences at that time had adopted agreements which had as their purpose meeting the competition of non-conference lines:

"The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) *meeting the competition of non-conference lines*. Eighty such agreements or understandings, involving practically all the regular steamship lines operating on nearly every American foreign trade route, are described in the foregoing report." (Italics supplied.)

Thus the Committee recognized that of the eighty conference agreements then in existence, at least some contained provisions for "meeting the competition of non-conference lines." Yet, the legislation recom-

mended by the Committee and enacted into law, provides (Section 15; 46 U. S. C. § 814):

“Agreements existing at the time of the organization of the * * * [Board] shall be lawful until disapproved by the * * * [Board]. * * *”

Thus the chief reliance of the Attorney General is proved fallacious.

The legislative history of Section 14 (46 U. S. C. § 812) also supports petitioners' position that contract systems are not illegal *per se*.

The Committee found that conferences had considered it necessary, in the avoidance of cutthroat competition and rate wars, to adopt certain devices aimed at non-conference competition. The measures thus adopted were of three kinds. First, there was the deferred rebate system. The Alexander Committee described the operation of this system and laid especial emphasis on the element of deferment whereby the shipper was kept under constant obligation to the conference lines (4 Alexander Rep. 287). Secondly, the Committee discussed the implement of the fighting ship which the Committee defined with exceptional preciseness (4 Alexander Rep. 289).

Thirdly, the Alexander Committee considered the contract system which it described in the following language (4 Alexander Rep. 290):

“(a) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The

rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e. are willing at all times to contract with all shippers on the same terms."

In submitting its Report to the House of Representatives, the Alexander Committee sent with it certain recommendations. The sixth recommendation is as follows (4 Alexander Rep. 421):

"(6) That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason."

If it may be contended that the language of Section 14 of the Shipping Act is at all ambiguous in that it may be interpreted so as to declare the contract system illegal *per se*, a consideration of the foregoing portions of the Alexander Committee Report, we submit, resolves the doubt in petitioners' favor. The Report exhibits a keen appreciation of the character of the deferred rebate, the fighting ship, and the contract system. The Committee specifically recommended the abolition of the fighting ship and the deferred rebate which it had defined with exceptional preciseness. Its Report is as silent with respect to the abolition of the contract system as is the statute which was enacted as a result of the Committee's labors.

We submit that the reason for the Committee action is obvious. We have noted that the Committee recog-

nized the inflexible unit of transportation in water commerce, *i. e.*, the ship. From that axiom of ocean transportation, it follows that the earning of compensatory revenues depends on the ability of the steamship owner *to fill his ship* at reasonable rates. A corollary of this axiom is that, if the major portion of the lines in the trade maintain stable rates, and a non-conference competitor enters the trade and offers rates which are fractionally lower than the conference rates, shippers will be impelled, by fear of similar action by competitors, to make their shipments, to the extent possible, by the non-conference line.¹³ The non-conference line will thus be able to fill its ships and earn compensatory revenues at the lower rates, whereas, the conference lines, with only partially filled holds, will experience continuing losses. Since the non-conference line can indefinitely expand its fleet by resorting to the world charter market, the conference lines, unless they be permitted to employ a rate stabilizing instrumentality such as the contract system, would have no alternative but to meet rate cut with rate cut and a rate war ending with the dissolution of the conference would be the inevitable result.

¹³ The point was well put in the Reports from Commissioners, Inspectors, and Others (more fully described in footnote at p. 76, *supra*) at p. 49, as follows:

"163. In this consideration, we think, the answer is to be found to the argument which has been advanced that, if the advantages above referred to are really to the benefit of trade, they will be supplied under the ordinary operations of the law of supply and demand. We are of opinion that, if shipowners were forbidden to use any means to secure custom other than the excellence of their service, the maintenance of a service offering these advantages would become impracticable. Shippers, even while admitting that it would be to their advantage collectively to ship only by the Conference Lines, would individually ship by tramp whenever a suitable opportunity offered. Indeed, the competition of their fellows would compel them to do so. And the loss of revenue thus occasioned to the regular Lines would render it necessary for them to choose between abandoning their services or conducting them in a very different way."

The obviously conscious decision of the Alexander Committee to leave to the conferences the device of the contract system, is undoubtedly to be explained upon the premise stated in the footnote to *Swayne & Hoyt*, 300 U. S. 297, 307 (1937):

"The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates', since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period."

FOURTH POINT.

THE COURT BELOW ERRED IN RULING THAT THE UNITED STATES IS WITHOUT REMEDY UNLESS ONE IS ACCORDED UNDER THE SHERMAN ACT.

It follows from what has been said that the Congress has set up the Board as the representative of the United States to bring about conformity by ocean carriers to the provisions of the Shipping Act. Section 22 of the Shipping Act (46 U. S. C. § 821) empowers the Board, without prior complaint from anyone, to investigate violations of the Act and to enter orders bringing such violations to an end. The Board has frequently exercised this power, *e. g.*, *Storage of Import Property*, 1 U. S. M. C. 676 (1937); *Free Time and Demurrage Charges at New York*, 3 U. S. M. C. 89 (1948), in which the Board ordered the carriers to correct abuses in the allowance of free time on import cargo and to adopt proper regulations; and *Rates, Charges and Practices of Carriers*, 2 U. S. M. C. 426 (1940), where the Board entered a cease and desist order to prohibit the carriers from permitting shippers to obtain unduly low rates by misclassifications of cargo.

The Government, therefore, does have a remedy, other than a hypothetical one under the Sherman Act, and the public welfare is thus completely protected even if the Attorney General were not empowered to initiate proceedings before the Board.

The Shipping Act itself contains evidence that it was the legislative purpose that the Board should have complete charge of the enforcement of the Shipping Act and thereby effectuate the great objects for the accomplishment of which the Act was designed.

The Act does recognize a function to be performed by the Attorney General. Thus under Sections 29 and 31 of the Act (46 U. S. C. §§ 828 and 830), in case of the violation of any order of the Board, other than one for the payment of money, and in suits brought to enforce, suspend, or set aside Board orders, authority is vested in the Attorney General primarily, to protect and to seek enforcement of the orders of the Board. It thus appears to be the legislative pattern that, so far as suit in court is concerned, the Attorney General shall have no necessary function and the Courts shall have no jurisdiction until after the Board's order shall have been entered.

However, we strongly urge that the United States, represented by the Attorney General, may initiate proceedings before the Board. Section 22 of the Shipping Act (46 U. S. C. § 821) provides that "Any person" may file a sworn complaint and thereby initiate a proceeding. The term "person", of course, has been variously construed in various statutes and in various contexts. Admittedly, the definition in Section 1 of the Shipping Act (46 U. S. C. § 801) does not specifically include a sovereign. That definition is as follows:

"The term 'person' includes corporations, partnerships, and associations, existing under or au-

thorized by the laws of the United States, or any State, Territory, District, or Possession thereof, or of any foreign country."

Nonetheless, the term "other person subject to this Act" (46 U. S. C. §801) has been interpreted as being sufficiently broad to include the State of California which was engaged in the business of furnishing wharfage and dock facilities. *California v. United States*, 320 U. S. 577 (1944).

We submit that the criterion enunciated in *United States v. Cooper Corporation*, 312 U. S. 600 (1941), should here result in bringing the United States, represented by the Attorney General, within the definition of "person" as used in Section 22 of the Act. It is true that in *Cooper Corporation* the Court held that the United States did not fall within a definition of the word "person" which does not differ materially from the definition in the Shipping Act. However, the criterion put forward in that case, we submit, requires a different result as applied to Section 22 of the Shipping Act. The pertinent language of the Court in *Cooper Corporation* (*id.* at 604-605) is as follows:

"Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law."

* * * * *

"Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory

language in its ordinary and natural sense, and if doubts remain, resolve them in the light; not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction. But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made."

Cooper Corporation was an action by the United States to recover treble damages for violation of the Sherman Act. Later, in *Georgia v. Evans*, 316 U. S. 159 (1942), *Cooper Corporation* was explained on the ground that, in the enactment of the Sherman Act, the United States had given itself three potent weapons, i. e., criminal prosecution, injunction, and forfeiture of property, and, hence, it was not to be supposed that it intended, by implication, to grant to itself the fourth remedy of treble damages. That such is the explanation of *Cooper Corporation* appears from the following language (316 U. S. at 161):

"The only question in the *Cooper* case was 'whether, by the use of the phrase 'any person,' Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act.' 312 U. S. at 604. Emphasizing that the United States had chosen for itself three potent weapons for enforcing the Act—namely, criminal prosecution under §§ 1, 2, and 3, injunction under § 4, and seizure of property under § 6—, the Court concluded that Congress did not also give the United States the remedy of a civil action for damages. This interpretation was drawn from the structure of the Act, its legislative history, the practice under it, and past judicial expressions. It was not held that the word 'person,' abstractly considered, could not include a governmental body. Whether the word 'person' or 'corpora-

tion' includes a State or the United States depends upon its legislative environment."

In holding that the term "person", as used in the Sherman Act, was broad enough to include a state within its scope, this Court pointed out (*id.* at 162):

"If the State is not a 'person' within § 8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act.

"The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. We have already held that such a remedy is afforded to a subdivision of the State, a municipality, which purchases pipes for use in constructing a waterworks system. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390. Reason balks against implying denial of such a remedy to a State which purchases materials for use in building public highways. Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7 as to exclude a State. Such a construction would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State."

The essence of *Georgia v. Evans*, we take it, is in the sentence:

"If the State is not a 'person' within § 8, the Sherman Law leaves it without any redress for

injuries resulting from practices outlawed by that Act."

It is not to be ignored that the Congress itself has in important legislation referred to the United States as a "person". Thus, in the proviso of Section 16 of the Clayton Act (15 U. S. C. §26), we find:

"*Provided, That nothing contained in Sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of Chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.*" (Italics supplied.)

It therefore appears that there is no hard and fast rule by which it can be ascertained whether the term "person", as used in the statute, does or does not include the sovereign. The logic of *Cooper Corporation* and *Evans* would seem to require the determination here that the United States, represented by the Attorney General, is a "person" within the intendment of Section 22.

The legislative history of the Shipping Act supports our contention. When the Bill which, with modifications, later became the Shipping Act, was before the House of Representatives, a colloquy took place between Representative Saunders, of Virginia, who was a member of the Alexander Committee and who also served as a presiding officer of the Democratic Caucus, convened to obtain passage of the Bill (53 Cong. Rec. 8082), and Representative Bennet, of New York, from which it appears that it was the purpose of the sponsors of the measure to give to the term "person" the broadest possible scope. Representative Bennet had objected to the inclusion in the

bill of a definition of the term "person", because he feared that in designating certain entities as included therein, other entities would thereby be excluded. To this Representative Saunders answered (53 Cong. Rec. 8277):

"Can the gentleman think of anybody who ought to be brought in that this does not bring in? If he does, let him tell us and we will bring him in."

Additional congressional discussions of the term "person" show that the term was intended to have the broadest possible scope (53 Cong. Rec. 8276-8278).

We submit that the instant case requires that the Government be included within the meaning of the term "person". If the Court should determine that the Government does not have an adequate remedy in the exercise of the powers granted to the Board under Section 22 of the Shipping Act, then we submit that any construction other than the one for which we contend would contort the symmetry of the Act. It would result in the unusual spectacle of legislation which, when invoked by a mere citizen, would be administered by the specialized body created by the Congress for that very purpose yet which, when invoked by the sovereign, would require administration by a court acting under the mandate of the Sherman Act whose purpose is antipodal to that of the Shipping Act. In such case, the Court, acting under a statute whose mandate requires the enforcing of unlimited competition, would be required to weigh in the balance such concepts as necessity for stability of rates and services, considerations with which the Sherman Act has no concern and for the determination of which the judicial process is without aptitude.

Whether or not the Attorney General has authority to initiate proceedings before the Board, the Government has an adequate legal remedy and, if that be the key to the controversy, a reversal is required.

FIFTH POINT.

THE FREIGHT CONTRACT BETWEEN THE CONFERENCE AND THE SHIPPER IS NOT SUBJECT TO ATTACK UNDER THE SHERMAN ACT.

The Attorney General argued below that the contract between the Conference and the shipper is a violation of the Sherman Act, for the reason that Section 15 of the Shipping Act (46 U. S. C. § 814) authorizes the Board to approve only agreements among common carriers or among other persons subject to the Act, or among parties in both such classes. There are two answers to this contention.

First, the complaint is based upon an alleged combination and conspiracy among the defendant lines, the essence of which is the dual rate system supported by exclusive patronage contracts with a great number of shippers. The result of this conspiracy is alleged to be the exclusion of other carriers from the outbound Far East trade, and the restraint of trade, and monopoly. The attack is not made, if indeed an attack could be made, upon the contract with an individual shipper as constituting a violation of the Sherman Act.

Secondly, the argument of the Attorney General on this point proceeds upon the proposition that the Alexander Committee had recommended that navigation companies, and the like, be required to file with a regulatory agency all contracts with shippers. The Congress did not accept this recommendation. From this circumstance the Attorney General deduces that the Congress intended that conferences acting under agreements actually approved, might not legally enter into contracts with shippers of the type exemplified by Exhibit B attached to the complaint. From this premise he concludes that each such contract with each shipper, not having been approved, is not pro-

ected by the provisions of Section 15 from attack under the Sherman Act.

We submit that the rejection by Congress of the Committee's recommendation is rather to be considered as a practical recognition by the Congress that the filing of thousands of individual contracts, identical except for the shipper's name, could serve no useful purpose. Such contracts, to be lawful, cannot vary in their terms from shipper to shipper. All needed regulation of such contracts could be secured if the regulatory body should be in a position to scrutinize the forms of contracts uniformly employed for all shippers, and either require that such forms be changed, as was done in *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948) and *Contract Routing Restrictions*, 2 U. S. M. C. 220 (1939), or permit them to stand.

The fallacy of the Attorney General's argument under this head, moreover, becomes manifest in the light of the following language of Section 15 of the Shipping Act (46 U. S. C. § 814):

"All agreements, modifications, or cancellations made after the organization of the * * * [Board] shall be lawful only when and as long as approved by the * * * [Board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation." (Italics supplied.)

If this language means anything, it means that, after an agreement shall have been approved and before it shall have been disapproved, it shall be lawful to carry out the agreement in whole or in part, directly or indirectly. The conference agreements are meaningless unless the carriers may take the measures which the agreements contemplate without

seeking a new approval each time action thereunder is to be taken.

An analogy may be found in *Central Transfer Co. v. Terminal Railroad Association of St. Louis*, 288 U. S. 469, 476 (1933). The situation there was the reverse of that here involved. Here, the Attorney General would attack acts done pursuant to an agreement which had been legalized by the Board. There, the attack was made upon an agreement, all the acts in the performance of which were subject to the jurisdiction of the Interstate Commerce Commission. The Court's language is most appropriate here:

"True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission. * * *"

An injunction to prevent performance of a legal agreement would be a paradox, indeed.

As we understand the opinion of the District Court, the Attorney General's argument referred to in this point was not accepted by it and we submit that, in this regard, the Court below was correct in its ruling.

SIXTH POINT.

THE INTERPRETATION OF THE SHIPPING ACT URGED BY PETITIONERS WOULD NOT RENDER THAT STATUTE UNCONSTITUTIONAL.

The Attorney General may here contend that the Shipping Act should not be interpreted as urged by petitioners, for the reason that, so interpreted, it would be unconstitutional in accordance with the principles laid down in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 537 (1935). That argument proceeds upon the hypothesis that a conference holds the power, by the institution of a contract system, either to exclude an outside line from the trade or to compel it to join the conference. So the argument is that by petitioners' interpretation, the group of private carriers would be vested by the Congress with the right to issue or withhold a certificate of convenience and necessity.

Even conceding, *arguendo*, that the contract system does have the farreaching economic effect stated in the hypothesis, still *Schechter* is not here applicable. In the Statute which *Schechter* declared unconstitutional, the Congress had laid down no standards by which any governmental agency could supervise or negate actions of the parties operating under the Code, whereas, the Shipping Act set up the Board as the controlling agency and abounds with specific directions to the Board to govern its regulatory duties.

Schechter involved a code adopted under Section 3 of the National Industrial Recovery Act (48 Stat. 195, 196). Under it, the Live Poultry Code had legislated in great detail on a number of subjects with respect to which the Act contained no enabling provisions or regulatory directions. For instance, in the sections of the Code having to do with labor, the Code specified the hours of work, the minimum

wages to be paid, the minimum number of employees and the minimum age of employees. All of this private legislation had been attempted under a statute which set up as substantially the only guidepost the maintenance of "fair competition". There was no agency to regulate the Code operations or to set them aside if inconsistent with the congressionally adopted standard. This Court (295 U. S. at 539-540) distinguished between the status of the poultry merchants under the Code on the one hand and the status of carriers operating under the Interstate Commerce Act, and radio broadcasting companies operating under the Radio Act of 1927 (44 Stat. 1162, 45 Stat. 373) on the other hand. Thereupon, the essence of the matter was put thus at pages 541-542:

"To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

A case that comes much closer to ours is *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940), which involved the constitutionality of the Bituminous

Coal Act of 1937 (50 Stat. 75). Much that was said there is applicable here. The Court, at page 395, described the conditions which the Act was adopted to correct:

"Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been 'degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims."

This language bears striking analogy to that of the Alexander Committee in describing an unregulated steamship industry (*supra*, pp. 79-80).

With respect to the power of Congress to pass such an Act, the Court said at pp. 395-396:

"To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade. That step could not be taken without plain disregard of the Constitution."

And again at p. 396:

"Certainly what Congress has forbidden by the Sherman Act it can modify. It may do so, by placing the machinery of price-fixing in the hands of public agencies. It may single out for separate treatment, as it has done on various occasions, a particular industry and thereby remove the penalties of the Sherman Act as respects it. Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of *laissez-faire*. It is not powerless to take steps in mitigation of what in its

judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other. The commerce clause empowers it to undertake stabilization of an interstate industry through a process of price-fixing which safeguards the public interest by placing price control in the hands of its administrative representative."

With respect to the legality or illegality of the delegation of legislative authority by the Congress, the Court said at p. 399:

"Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid. *Curriu v. Wallace*, *supra*, and cases cited."

In our Second Point (pp. 48 to 72, *supra*), we have detailed the specific directions which the Congress has given not alone to the Board but to the industry, and the inhibitions which had been laid upon both. They adequately distinguish regulation under the Shipping Act from the procedure adopted under the National Industrial Recovery Act. The following cases support the distinction which we have here made:

Curriu v. Wallace, 306 U. S. 1, 15-16 (1939);
New York Central Securities Co. v. United States, 287 U. S. 12, 25-26 (1932); and
United States v. Rock Royal Co-op, 307 U. S. 533, 577-578 (1939).

SEVENTH POINT.

THE CASES RELIED UPON BY THE ATTORNEY GENERAL.

Under this head we shall discuss the cases upon which the Attorney General chiefly relied below.

The Attorney General cited *United States v. Borden Co.*, 308 U. S. 188 (1939), in support of his proposition that the United States may sue under the Sherman Act when private individuals may not so sue; although the Court below cited *Borden* for a more limited proposition, *i. e.*, that the Shipping Act affords the petitioners a defense but does not curtail the jurisdiction of the Court under Section 4 of the Sherman Act (94 F. Supp. at 903, R. 100).

In *Borden*, an indictment had been found against dairy farmers, distributors of milk, leaders of a union of milk truck drivers, and officials of the City of Chicago, charging that the defendants had conspired to fix the price to be paid to members of an association of milk producers for milk to be distributed in the City of Chicago.

The District Court sustained an attack upon the indictment on the ground that under the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. §§ 671-674) and its predecessor Acts, the Cooperative Marketing Act of July 2, 1926 (7 U. S. C. §§ 451-457), and the Agricultural Adjustment Act of 1933 (7 U. S. C. §§ 601-659), as well as under the Capper-Volstead Act (7 U. S. C. §§ 291-292), the questions presented in the indictment were required in the first instance to be passed upon by the Secretary of Agriculture under an application of the primary jurisdiction rule.

This Court disapproved of the ruling of the District Court so far as concerns the Capper-Volstead Act, on the ground that the latter Act applied only to

farmers and did not profess, under any circumstances, to give validity to combinations among farmers, distributors, labor union officials and city officials. The Court ruled that, here, to use the expression adopted in *Terminal Warehouse*, 297 U. S. 500, 515-516 (1936), was "a circumambient conspiracy". In this connection the court said (308 U. S. at 204-205):

"The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise. *In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below, 'to compel independent distributors to exact a like price from their customers' and also to control 'the supply of fluid milk permitted to be brought to Chicago.'* 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in § 1 of the Capper-Volstead Act." (Italics supplied.)

This Court disposed of the contention that the application of the primary jurisdiction rule was required by the provisions of the Agricultural Marketing Agreement Act and its predecessor Acts upon the

ground that those Acts, while validating agreements among farmers and handlers of agricultural products of a specified type if the Secretary of Agriculture should become a party thereto (the Secretary had not become a party to the agreement in question), did not go further and condemn as illegal or provide a punishment for agreements which had not thus been validated. In this respect, the Agricultural Marketing Agreement Act and its predecessor Acts differed distinguishably and sharply from the Shipping Act. Section 15 of the Shipping Act (46 U. S. C. § 814), while validating agreements of the specified types which should receive the approval of the Board, also condemns all such agreements which are not so approved and stamps them as illegal and provides the punishment therefor. That this is the distinction which this Court had in mind appears from the following language in *Borden* (*id.* at 199-200):

"That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched."

The Shipping Act not only specifies what agreements are valid but does impinge upon the prohibitions and penalties of the Sherman Act by specifically condemning private action in entering into agreements which have not been approved by the Board. There

is no suggestion in *Borden* that the administrative remedy was dispensed with because the United States rather than a private person was the plaintiff.

The Attorney General also relied on *United States Alkali Export Association, Inc. v. United States*, 325 U. S. 196 (1945), although as we understand its opinion, the Court below did not accept this application of that case. *Alkali* involved charges of violation of the Sherman Act by parties to an association organized under the Webb-Pomerene Act (15 U. S. C. §§ 61-65). This is the Act which authorizes American exporters to associate for purposes of acting cooperatively, with the limitation, among others, that such association shall not take any action which might result in the restraint or monopolization of interstate trade or which might tend to exclude other American merchants from the export trade. The statute does not itself prohibit or render unlawful any restraint or monopolization of interstate or foreign commerce. The Federal Trade Commission is given power to investigate any alleged violation of the law and, if it should find a violation and non-compliance with its subsequent recommendations, to refer its finding to the Attorney General of the United States for proper action (15 U. S. C. § 65). It has, however, no power to hear and determine questions of violation, or to issue orders imposing penalties or requiring cessation of the violations. The only remedies were under the Sherman Act. Monopolization or restraint of interstate trade continued to constitute a violation only of the Sherman Act and not of the Webb-Pomerene Act. That these were the points upon which this Court rejected defendants' contention that prior resort to the Federal Trade Commission was a prerequisite to antitrust action is amply substantiated by the following language (325 U. S. at 206):

"In determining whether the Webb-Pomerene Act curtailed the then existing authority of the

United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. *But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations.*" (Italics supplied.)

The Court then discussed the argument that Congress could not have contemplated concurrent jurisdiction of the Federal Trade Commission and the courts. It thereupon proceeded to say, *id.* at 208:

"This argument overlooks the fact that the Commission's authority is to investigate and recommend, not to restrain violations of the antitrust laws (save as they may incidentally be violations of other statutes, which the Commission may enforce). The Commission, by its investigations and recommendations, may render a useful service in bringing violations to the attention of the Department of Justice or by showing that resort to the courts is unnecessary, either because there has been no violation or because the associations have satisfactorily corrected their trade practices. *But the Commission, under the Webb-Pomerene Act, does not enforce the antitrust laws; its powers are exhausted when it has referred its findings to the Attorney General.* Indeed, the provisions for such reference are necessary not because the Commission has a primary jurisdiction, but only because it cannot itself enforce the antitrust laws. Further, there is no want of specific authority for the United States to enforce the antitrust laws; *the violations here alleged are not violations of the Webb-Pomerene*

Act, but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States." (Italics supplied.)

In neither *Borden* nor *Alkali* did this Court intimate that the administrative remedy could be circumvented merely because the Attorney General, on behalf of the United States had instituted an antitrust suit.

The Attorney General cited *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U. S. 156 (1922). It cannot be overemphasized that *Keogh* was a suit at law for treble damages (and not a suit for an injunction) instituted by a shipper against a number of railroads and their officers, alleging that the defendants had conspired to fix rates and charges. The following quotations demonstrate the inapplicability of the case (*id.* at 161-162):

"All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching* case, 234 U. S. 294. But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, and *United States v. Joint Traffic Association*, 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government. It does not, however, follow that *Keogh*, a private shipper, may recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. * * *

(Italics supplied.)

and at p. 163:

"Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property'. Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier * * * And they are not affected by the tort of a third party. * * * This stringent rule prevails because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. *If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.* It is no answer to say that each of these might bring a similar action under § 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. * * * (Italics supplied.)

Thus, Keogh was denied the right to recover *treble damages* in order to avoid giving him a preference. The Court contrasted this right with the remedies which the Government might have because of the acts complained of:

"the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6."

Clearly, Keogh was in no position to prosecute criminal proceedings or to sue for forfeiture. *The*

fact is that he did not sue for an injunction, nor did this Court consider even by way of dictum what his right would have been had he sued for an injunction. Had he sued for an injunction, his right to do so would have been sustained, as is demonstrated by *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439 (1945). Therefore both the private litigant and the Government had equal right to equitable relief.

Our research has disclosed no case in which any court has decided that in any situation analogous to *United States Navigation* different rules govern, dependent upon whether the plaintiff is the United States or a private party.

CONCLUSION.

FOR THE REASONS STATED, IT IS RESPECTFULLY SUBMITTED THAT THE ORDER OF THE COURT BELOW SHOULD BE REVERSED TO THE EXTENT TO WHICH REVIEW OF SUCH ORDER WAS BROUGHT BEFORE THIS COURT BY THE GRANT OF THE WRIT OF CERTIORARI.

Respectfully submitted,

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New York, New York
January 7, 1952

APPENDIX.

A. Selected provisions of the Sherman Act (extracted from Title 15, U. S. C. A.).

Sec. 1. (15 U. S. C. sec. 1.) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. (15 U. S. C. sec. 2.) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. (15 U. S. C. sec. 4.) The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restrain-

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ing order or prohibition as shall be deemed just in the premises.

B. Selected provision of the Clayton Act (extracted from Title 15, U. S. C. A.).

Sec. 16. (15 U. S. C. sec. 26.) Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue: *Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1 and 8 of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

C. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U. S. C. A.).

Sec. 1. (46 U. S. C. sec. 801.) When used in this chapter: The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce".

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The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

Sec. 14. (46 U. S. C. sec. 812.) No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter [Act] means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper

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has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter [Act] means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$25,000 for each offense.

Sec. 14a. (46 U. S. C. sec. 813.) The commission [Board] upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 812 of this title, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal

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terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the commission [Board] determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the commission [Board] shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the commission certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

Sec. 15. (46 U. S. C. sec. 814.) Every common carrier by water, or other person subject to this chapter [Act], shall file immediately with the commission [Board] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission [Board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters

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from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [Board] shall be lawful until disapproved by the commission [Board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [Board].

All agreements, modifications, or cancellations made after the organization of the commission [Board] shall be lawful only when and as long as approved by the commission [Board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates and provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Sec. 16. (46 U. S. C. sec. 815.) It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this chapter [Act], either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality,

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or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter or agent thereof, not to give a competing carrier, by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter [Act].

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense.

Sec. 17. (46 U. S. C. sec. 816.) No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission [Board] finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this chapter [Act] shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the commission [Board] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Sec. 18. (46 U. S. C. sec. 817.) Every common carrier by water in interstate commerce shall es-

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tablish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the commission [Board, and keep open to public inspection, in the form and manner and within the time prescribed by the commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the commission [Board] and after ten days' public notice in the form and manner prescribed by the commission [Board], stating the increase proposed to be made; but the commission [Board] for good cause shown may waive such notice.

Whenever the commission [Board] finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Sec. 19.] (46 U. S. C. sec. 818.) Whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise

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injuring a competitive carrier by water, it shall not increase such rates unless after hearing the commission [Board] finds that such proposed increase rests upon changed conditions other than the elimination of said competition.

Sec. 20. (46 U. S. C. sec. 819.) It shall be unlawful for any common carrier by water or other person subject to this chapter [Act], or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information, knowingly to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this chapter [Act] for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

Nothing in this chapter [Act] shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Sec. 21. (46 U. S. C. sec. 820.) The commission [Board] may require any common carrier by water, or other person subject to this chapter [Act], or any officer, receiver, trustee, lessee, agent, or employee

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thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board [sic] so requires, and shall be furnished in the form and within the time prescribed by the commission [Board]. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than \$1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

Sec. 22. (46 U. S. C. sec. 821.) Any person may file with the commission [Board] a sworn complaint setting forth any violation of this chapter [Act] by a common carrier by water, or other person subject to this chapter [Act], and asking reparation for the injury, if any, caused thereby. The commission [Board] shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission [Board] satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission [Board] shall, except as otherwise provided in this chapter [Act], investigate it in such manner and by such means, and make such order as it deems proper. The commission [Board], if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The commission [Board], upon its own motion, may in like manner and, except as to orders for the

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payment of money, with the same powers, investigate any violation of this chapter [Act].

Sec. 23. (46 U. S. C. sec. 822.) Orders of the commission [Board] relating to any violation of this chapter [Act] shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission [Federal Maritime Board], other than for the payment of money, made under this chapter [Act], as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the commission [Board], or be suspended or set aside by a court of competent jurisdiction.

Sec. 24. (46 U. S. C. sec. 823.) The commission [Board] shall enter of record a written report of every investigation made under this chapter [Act] in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The commission [Board] may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, District, and possessions thereof.

Sec. 25. (46 U. S. C. sec. 824.) The commission [Board] may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the commission [Board], operate as a stay of such order.

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Sec. 26. (46 U. S. C. sec. 825.) The commission [Board] shall have power, and it shall be its duty whenever complaint shall be made to it, to investigate the action of any foreign government with respect to the privileges afforded and burdens imposed upon vessels of the United States engaged in foreign trade whenever it shall appear that the laws, regulations, or practices of any foreign government operate in such a manner that vessels of the United States are not accorded equal privileges in foreign trade with vessels of such foreign countries or vessels of other foreign countries, either in trade to or from the ports of such foreign country or in respect of the passage or transportation through such foreign country of passengers or goods intended for shipment or transportation in such vessels of the United States, either to or from ports of such foreign country or to or from ports of other foreign countries. It shall be the duty of the commission [Board] to report the results of its investigation to the President with its recommendations and the President is authorized and empowered to secure by diplomatic action equal privileges for vessels of the United States engaged in such foreign trade. And if by such diplomatic action the President shall be unable to secure such equal privileges then the President shall advise Congress as to the facts and his conclusions by special message, if deemed important in the public interest, in order that proper action may be taken thereon.

Sec. 27. (46 U. S. C. sec. 826.) For the purpose of investigating alleged violations of this chapter [Act], the commission [Board] may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any member of the commission [Board], and oaths or affirmations may be administered, witnesses examined, and evidence received by any member or examiner, or, under the direction of the commission [Board], by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting

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under the direction of the commission [Board] and witnesses shall, unless employees of the commission [Board], be entitled to the same fees and mileage as in the courts of the United States. Obedience to any such subpoena shall, on application by the commission [Board], be enforced as are orders of the commission [Board] other than for the payment of money.

Sec. 28. (46 U. S. C. sec. 827.) No person shall be excused on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence, in obedience to the subpoena of the commission [Board] or of any court in any proceeding based upon or growing out of any alleged violation of this chapter [Act]; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, except that no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 29. (46 U. S. C. sec. 828.) In case of violation of any order of the commission [Board], other than an order for the payment of money, the commission [Board], or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Sec. 30. (46 U. S. C. sec. 829.) In case of violation of any order of the commission [Board] for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United

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States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the commission [Board] in the premises.

In the district court the findings and order of the commission [Board] shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs of any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the commission [Board] has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

Sec. 31. (46 U. S. C. sec. 830.) The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission [Board] shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

Sec. 32. (46 U. S. C. sec. 831.) Whoever violates any provision of this chapter [Act], except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by fine of not to exceed \$5,000.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 15, MISCELLANEOUS.

**FAR EAST CONFERENCE, UNITED STATES LINES
COMPANY, STATES MARINE CORPORATION, et al.,**

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent,

and

FEDERAL MARITIME BOARD,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY.

**BRIEF FOR THE PETITIONER, ISTHMIAN
STEAMSHIP COMPANY.**

JOHN W. DAVIS,

— JOSEPH STRYKER,

Counsel for Petitioner, Isthmian Steamship Co.

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Supreme Court of the United States

OCTOBER TERM, 1951.

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BRIEF FOR THE PETITIONER, ISTHMIAN STEAMSHIP COMPANY.

Opinion Below.

The opinion of the District Court (R. 97-104) is reported
at 94 Fed. Sup. 900.

Jurisdiction.

The judgment of the District Court was entered on
March 7, 1951 (R. 104-105). The motion for leave to file
petition for writ of certiorari under section 1651(a) of
Title 28, U. S. Code (formerly Section 262, Judicial Code,
28 U. S. C., Section 377) was filed on June 2, 1951, to which

was annexed the petition for such writ of certiorari. Order granting motion for leave to file petition for writ of certiorari was made and entered on October 8, 1951 (R. 105). The jurisdiction of this Court to review the order and judgment, review of which is sought, is sustained by *United States Alkali Export Assn. vs. United States*, 325 U. S. 196; *De Beers Consolidated Mines vs. United States*, 325 U. S. 212.

Questions Presented.

1. Whether the United States Maritime Commission, now the Federal Maritime Board, is vested with exclusive primary jurisdiction to determine the lawfulness or unlawfulness of the conduct charged in the complaint.

2. Whether the approval by the Shipping Board and the Maritime Commission of the defendant's conference agreement and amendments thereof pursuant to the provisions of Section 15 of the Shipping Act of 1916, as amended (46 U. S. C., §814) exempts the defendants from prosecution under the Sherman Act with respect to the conduct charged in the complaint.

Statutes Involved.

The statutes involved are Sections 1, 2 and 4 of the Act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies, as amended," commonly known as the "Sherman Antitrust Act", and an Act of Congress of September 7, 1916, entitled "An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a

naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes," and the amendments thereof, commonly known as the "Shipping Act of 1916," U. S. C. §801 *et seq.* The pertinent provisions of the Sherman Act and the Shipping Act are set forth in the appendix hereto attached.

Statement.

The complaint (R. 1-21) in this cause alleges that the defendant, Far East Conference is a voluntary association and organization of steamship lines; that the other defendants are engaged as common carriers by water in the transportation of property in the foreign trade from the Atlantic Coast and Gulf ports of the United States to the ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippine Islands designated in the complaint and herein as the "Outbound Far East Trade". Such carrier defendants are members of the defendant, Far East Conference, under an agreement known as "United States Maritime Commission Conference Agreement No. 17" approved November 14, 1922, under the provisions of Section 15 of the Shipping Act as amended. A true copy of said agreement, as amended to December 4, 1947, is attached to the complaint as Exhibit A (R. 8-16).

The complaint further alleges that the membership of Far East Conference includes all but one of the common carrier shipping lines regularly engaged in the Far East trade and that the members of the Far East Conference carry virtually all the commercial tonnage transported by shipping lines engaged in that trade (R. 4, 5).

Paragraph 31 of the complaint charges that the defendants are engaged in an unlawful conspiracy in restraint of trade and commerce of the United States with foreign nations to monopolize and that they have monopolized such trade and commerce in violation of Section 2 of the Sherman Antitrust Act (R. 5).

Paragraph 32 states that the alleged unlawful conspiracy consists of concerted action by the carrier defendants in establishing and maintaining a system of "contract" rates and higher "non contract" rates, the sole consideration for the enjoyment of the lower "contract rates" being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade. A copy of the Agreement pursuant to which contract rates are charged is annexed to the complaint (R. 16-20).

As above stated, the Conference Agreement (R. 8-16), and all of its amendments have been approved by the administrative agency charged with the duty of enforcing the Shipping Act of 1916 (R. 5 and 11).¹

Paragraphs 8 and 9 of the Conference Agreement (R. 10 and 11) provide as follows:

"8. The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freights, brokerages, or other charges; or the regulation of transportation between the aforementioned ports at any meeting of the Conference, provided that notice in writing, descriptive of the matter to be considered, has been given each party hereto by the Secretary, at the direction of the Chairman, at

¹ Note: The administrative agency is now the Federal Maritime Board. It was formerly the United States Maritime Commission and prior to that the Shipping Board administered the Act. In this brief the agency will be called the "Maritime Board" throughout regardless of the Agency which was acting at the time.

not-later than 4 P. M. of the day prior to the date of meeting; and the Chairman shall cause such notice to be given on the request of any party hereto made in writing to the Chairman not later than 11:00 A. M. of the day prior to the date of meeting. If all of the parties hereto are present at any meeting, action may be taken on any matter within the scope of this agreement without prior notice thereof. Any matter or thing brought before the meeting in the manner aforesaid and agreed to by a majority of the parties hereto, shall thereby become an agreement binding upon all of the parties hereto, with the same force and effect as if expressly made a part of this agreement.

"9. Pursuant to recommendations made by the Chairman, or pursuant to the recommendation of any Committee or Sub-Committee authorized by a majority vote of the parties (fol. 16) hereto and appointed as provided in Article 7 hereof, or without any recommendation, the parties shall establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the agreement by the affirmative vote of the majority of their number, at any meeting held in accordance with the provisions of Article 8 hereof, and all of the parties hereto agree that they will be bound by the affirmative vote of the majority of their number upon the matters aforesaid with the same force and effect as if expressly made a part hereof."

Paragraph 24 thereof (R. 16) provides that any person, firm or corporation may hereafter become a party to the Agreement by the consent of a majority of the parties thereto by executing the Agreement and making the deposit required by Article 10 thereof.

The contract rate agreement with shippers (Exhibit B to the complaint R. 16-20) provides in paragraph 1 thereof

that the shipper in consideration of the rates and other conditions stated in the Agreement agrees to forward by members of the Far East Conference all shipments made directly or indirectly by agents, subsidiaries, associated and/or parent companies and shipped from United States ports, excepting Pacific Coast ports, to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and Philippine Islands. A supplement to the contract states the commodities involved and the rates and conditions of the contract (R. 20).

Under Paragraph 3 (R. 18) the shipper has the option of selecting any of the vessels operated by any of the members of the Far East Conference provided that required space to port of destination is available.

Paragraph 2 of the Agreement provides that in the event of an increase in rates the shippers shall be given written notice thereof not less than thirty days in advance of the increase and within ten days from the receipt of the notice the shipper may cancel the contract as of the effective date of the increased rate or rates, subject to the option of the carriers either to accept cancellation or to continue the contract under the rates in effect at the time notice of increase was given.

Section 15 of the Shipping Act of 1916 (46 U. S. C. §814), as amended, provides as follows:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommoda-

tions; or other special privileges or advantages; controlling; regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action. Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; Ex. Ord. No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016."

Motions were made by the defendants to dismiss the complaint on the ground that the Maritime Board had exclusive primary jurisdiction of the charges alleged in the complaint and also upon the ground that the complaint failed to state a claim upon which relief can be granted (R. 72 and 74). The Maritime Board which was permitted to intervene as a defendant by the Court made a motion to dismiss the complaint on the same grounds (R. 94 and 95). These motions were denied (R. 104).

Summary of Argument.

The Shipping Act regulates the business of common carriers by water in a manner which is different from and inconsistent with the provisions of the Sherman Act and vests in the Maritime Board the power and the duty not only to approve or disapprove Conference agreements among carriers by water, but also to police what is done under such agreements and to cancel its approval thereof if, in its judgment, what is done involves conduct which is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act.

It appears from the complaint that the Conference Agreement and all of its amendments were filed with the

Maritime Board, as required by Section 15 of the Shipping Act, and that such Agreement and all of its amendments were duly approved by the Maritime Board. The Conference Agreement and the acts done thereunder within its purview are exempted from the provisions of the Sherman Antitrust Act. The "contract non-contract" rates which are the basis of the complaint were fixed by the Conference pursuant to the Conference Agreement which provides that the members of the Conference may agree upon rates and adhere to the rates upon which they agree (R. 11).

ARGUMENT.

I.

The Federal Maritime Board is vested with exclusive primary jurisdiction to determine the lawfulness or unlawfulness of the conduct charged in the complaint.

The Shipping Act of 1916 contains a complete system for the regulation of the business of common carriers by water, which is entirely different from and inconsistent with the Sherman Act. It expressly prohibits certain conduct which it very definitely describes (Sections 14, 16, 17) (46 U. S. C. §§812, 815, 816). It vests in the administrative board which it creates (now the Federal Maritime Board) comprehensive powers for the enforcement of its provisions. The exercise of these powers in accordance with the purpose of the Act requires expert knowledge of the Shipping Industry.

Under section 15 of the Act (46 U. S. C. §814) the Board has not only the power but also the duty to approve agreements among competitors which but for the Shipping Act

would clearly violate the Sherman Act. Such approval is to be given if the Board finds that such agreements and the acts to be done thereunder comply with the standards prescribed by the Act.

The Board also has the power and the duty to refuse approval of agreements which it determines violate such standards or to cancel its previous approval. To perform an agreement of the kind mentioned in Section 15 of the Shipping Act without approval of the Board or after cancellation of such approval entails the severe penalty prescribed by the above mentioned section. Refusal to comply with an order of the Board or a violation of provisions of the Act is punishable by severe penalties.

The conduct charged in the complaint in this case, if unlawful, is a violation not of the Sherman Act but of the Shipping Act. The question of whether such conduct is a violation of the Shipping Act is a question which in the first instance must be determined by the Federal Maritime Board in the exercise of the jurisdiction conferred upon it by the Act and in the light of its expert knowledge of all of the intricate technical facts and usages of such industry.

In *United States Navigation Co., Inc. vs. Cunard Steamship Co., Ltd., et al.*, 284 U. S. 474, the plaintiff brought suit to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Antitrust Act. The District Court granted a motion to dismiss the complaint (39 Fed. (2d) 204) on the ground that the matters complained of were within the exclusive primary jurisdiction of the United States Shipping Board under the Shipping Act of 1916, as amended by the Merchant Marine Act of 1920. The Circuit Court of Appeals affirmed (50 Fed. (2d) 83). This Court granted certiorari and affirmed.

The complaint in the *U. S. Navigation Co.* case alleged that the petitioner operated steamships for the carriage of general cargo between the port of New York and specified foreign ports; that the respondents carried 95% of the general cargo trade from Atlantic ports in the United States to the ports of Great Britain and Ireland; that the defendants and the petitioner were the only lines maintaining general cargo services in that trade; and that the respondents had entered into and were engaged in a combination and conspiracy to restrain the foreign trade and commerce of the United States in respect of the carriage of general cargo from the United States to the foreign ports named, with the object and purpose of monopolizing such trade and commerce.

It was further alleged that the conspiracy involved the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agreed to confine their shipments to the lines of respondents and that the differentials thus created between the two rates were not predicated upon volume of traffic or frequency or regularity of shipment but were purely arbitrary and wholly disproportionate to service rates. The sole consideration was their effect as a coercive measure. Other means to accomplish the same end were alleged. This Court said at page 480:

"It may be conceded that, looking alone to the Sherman Antitrust Act, the bill states a cause of action under §§ 1 and 2 of that act, and, consequently, furnishes ground for an injunction under §16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below."

At page 481 this Court said, with reference to the Interstate Commerce Act:

"* * * The rule had become settled, that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, with certain exceptions not applicable here, that a remedy must be sought from the commission before the jurisdiction of the courts could be invoked. In this situation the Shipping Act was passed. In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion."

At page 482 this Court said:

"* * * Such resort, it was said, must be had where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate

appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.' "

At page 485 this Court with reference to the Shipping Act of 1916 said:

"The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *United States v. Hamburgh-American S.S. Line*, 216 Fed. 971."

Also at page 485:

"* * * The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named

act rests upon stronger ground, since the decisions of this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act."

It was contended by the petitioner in *United States Navigation Co. vs. Cunard Steamship Co.* that the complaint alleged an agreement among the respondents that the Maritime Board had no power to approve and that therefore the motions to dismiss the complaint should not have been granted. As to such contention this Court said in part at page 487:

"... And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

The *United States Navigation Co.* case is cited by this Court in *Swayne & Hoyt, Ltd. vs. United States*, 300 U. S. 297.

Swayne & Hoyt was a steamship corporation engaged in interstate, as distinguished from foreign, commerce. It

was operating under an agreement approved by the United States Shipping Board under Section 15 of the Shipping Act of 1916, 46 U. S. C. §814.

Pursuant to the provisions of the Intercoastal Shipping Act of 1933, 46 U. S. C. §§845 and 845a, which provisions do not affect carriers in foreign commerce, it filed a new tariff with the United States Shipping Board. This tariff provided for contract rates for specified commodities to be enjoyed by shippers who agreed with the Conference by written contract to make all their shipments of those commodities by vessel of the Conference members for a specified period. After an investigation Swayne & Hoyt were required by the Maritime Board to cease charging the higher rate to shippers who had not entered into the contract. On direct review this order was affirmed and the case came before this Court on appeal.

The important difference between the regulation of carriers engaged in foreign commerce and those engaged in intercoastal shipping was that the latter were required to file schedules of rates with the Maritime Board which were subject to change only on thirty days notice and to examination by the Board as to their lawfulness with power to suspend the rate pending investigation. Although the Maritime Board and its predecessors had approved contract non-contract rates in the foreign trade,¹ it regarded such rates as unnecessary in the Intercoastal trade.

In affirming the decision of the three-judge court, this Court said at page 303:

"As pointed out by this Court in *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, the provisions of the Shipping Act which confer upon the Shipping Board authority over rates and prac-

¹ Note; See Gulf Intercoastal Contract Rates, 1 U. S. Mar. Com. Rep. p. 524.

tices of carriers by water, and prescribe the mode of its exercise, closely parallel those of the Interstate Commerce Act establishing the corresponding relations of the Interstate Commerce Commission to carriers by rail. Both have set up an administrative agency to whose informed judgment and discretion Congress has committed the determination of questions of fact, on the basis of which it is authorized to make administrative orders.

"Such determinations will not be set aside by courts if there is evidence to support them. Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment. See *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 481; *Pennsylvania Co. v. United States*, 236 U. S. 351; cf. *United States Navigation Co. v. Cunard S. S. Co.*, *supra*, 484. Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic" (citing cases).

This Court further said at page 304:

"In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter."

The *United States Navigation Co.* case, *supra*, was cited in *West India Fruit & Steamship Co., Inc., et al. vs. Sea-*

train Lines, Inc. (C. C. A. 2d 1948), 170 Fed. (2d) 775, petition for certiorari dismissed on petitioner's motion, 336 U. S. 908; *Wisconsin & Michigan Transportation Co. vs. Pere Marquette*, 67 Fed. (2d) 937. See also: *Isbrandtsen Co., Inc. vs. United States, et al.*, 81 Fed. Supp. 544, appeal dismissed without opinion 336 U. S. 941.

Swayne & Hoyt, Ltd. vs. United States was cited by this Court in *United States vs. Trucking Company*, 310 U. S. 344, 353.

The *United States Navigation Co.* case, *supra*, and the reasons upon which the decision is based are applicable to the case at bar.

The trial court attempted to distinguish the *United States Navigation Co.* case upon the ground that the plaintiff in that case was a common carrier by water, whereas, the plaintiff in the case at bar is the United States, relying solely upon the fact that this Court said in the *United States Navigation Co.* case that the remedy afforded by the Shipping Act was the only remedy to which the private litigant was entitled. The Shipping Act not only provides a civil remedy, it also provides severe penalties for violation of its provisions. See last paragraph of Section 15, 46 U. S. C. §814, the last paragraph of Section 16, 46 U. S. C. §815 and the last paragraph Section 21, 46 U. S. C. §820.

This attempted distinction entirely ignores the reasoning upon which the decision in the *United States Navigation Co.* case is based. This reasoning may be summarized as follows:

First, that the violation alleged in the complaint was a violation of the Shipping Act.

Second, that the Shipping Act is permissive as well as restrictive, and that it is the intent of the Act that the application of its standards should be applied by the Maritime

Board to the conduct of carriers and its lawfulness or unlawfulness determined by a body of experts having knowledge of the shipping industry not possessed by a Court.

Third, that the same principle which has for many years been applied to the construction and application of the Interstate Commerce Act in determining the exclusive primary jurisdiction of the Interstate Commerce Commission should be applied to the construction and application of the Shipping Act. It should be noted that this Court in the *United States Navigation Co.* case stated that the Maritime Board (then the Shipping Board) might, after investigation, find that the conduct of the respondents in that case was lawful no matter how unlawful it might appear to be on the face of the complaint.

This Court, therefore, refused to determine whether the conduct charged was lawful or unlawful until after the administrative body had made its investigation and reached its conclusion. It is impossible to believe that the lawfulness or unlawfulness of conduct may depend upon whether such conduct is challenged by a private litigant or by the United States. No case was cited either by the Government or in the opinion of the District Court which lends any support to such a view.

In *United States vs. Pacific and Arctic Co.*, 228 U. S. 87, steamship lines running from the United States to Alaska, a wharf company owning all of the wharves in Skagway, Alaska, and railroad companies, some of which were American companies having their rights of way in Alaska, and others of which were Canadian companies traversing Canadian territory, were indicted.

Counts one and two of the indictment charged that the defendants had engaged in a combination and conspiracy in restraint of trade and commerce to eliminate and destroy

competition in the business of transportation of freight and passengers between various ports in the United States and British Columbia and the several cities in the valley of the Yukon River and its tributaries.

The third count charged an unlawful and unjust discrimination in the transportation of passengers and freight in violation of the Interstate Commerce Act.

Counts four and five were substantially the same as count three.

The District Court held that it was without jurisdiction to entertain or determine the questions involved in the first five counts until they had been submitted to and passed upon by the Interstate Commerce Commission. This Court reversed, holding that the District Court had jurisdiction over the conspiracy counts. It will be noted that at the time this case was decided the Shipping Act had not yet been enacted and that the Interstate Commerce Commission had no power or jurisdiction with respect to such a conspiracy because such power had not then been conferred by the Interstate Commerce Act and also because some of the parties to such conspiracy were not subject to the Interstate Commerce Act.

This Court, however, held that the District Court had no jurisdiction over the counts which charged unlawful and unjust discrimination in the transportation of passengers and freight in violation of the Interstate Commerce Act. The reasons stated by this Court for affirming the dismissal of counts 3, 4 and 5 are applicable to the case at bar.

On this point this Court said at page 107:

"The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its require-

ments, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to-wit: *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, supra. And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

It is as true of the Shipping Act as of the Interstate Commerce Act that it is more regulatory and administrative than criminal and also that some of the requirements of the Shipping Act depend upon the exercise of the administrative power of the Maritime Board.

It is also true that the great problems which the Shipping Act was intended to solve and the great purposes it was intended to effect are of much greater importance than the facility which should be given to some particular remedy, civil or criminal.

It is interesting to note that this Court cited as supporting its conclusion *Texas & Pacific Ry. Co. vs. Abilene*

Cotton Oil Co., 204 U. S. 426, and *Baltimore & Ohio Railroad Co. vs. Pitcairn Coal Co.*, 215 U. S. 481, 492, both of which suits were instituted by private litigants. The citation of these cases indicates that this Court believed that with respect to determination of questions, committed by act of Congress to an administrative board, the rule is the same whether the action be instituted by the United States Government or by a private litigant.

This principle also appears from the cases which cite *United States vs. Pacific and Arctic Navigation Co.*

In the *Minnesota Rate Cases*, 230 U. S. 352, 419, this Court said with reference to the Interstate Commerce Act:

“ * * * The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it.”

citing cases, all of which, except the *United States vs. Pacific and Arctic Co.*; *supra*, were cases brought by private litigants.

In *Pennsylvania Railroad Company vs. Clark Brothers Coal Mining Company*, 238 U. S. 456, 469, this Court said:

“ * * * Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule.”

citing among other cases *United States vs. Pacific and Arctic Co., supra.*

In *Great Northern Railway Company, et al. vs. Merchants Elevator Company*, 259 U. S. 285, at page 291, Justice Brandeis said:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contra-distinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

citing, among other cases, in a footnote *United States vs. Pacific and Arctic Ry. & Nav. Co.*, 228 U. S. 87.

In *Rochester Telephone Corp. vs. United States*, 307 U. S. 125, 139, Justice Frankfurter said:

"From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked."

A footnote to the opinion in the *Rochester* case, at page 139 cites many cases including *U. S. Navigation Co. vs. Cunard Steamship Co.*, *supra*. See also: *Mitchell Coal and Coke Company vs. Pennsylvania Railroad Company*, 230 U. S. 247, 258.

These decisions and many others which might be cited amply support the principle that exclusive primary jurisdiction under statutes such as the Interstate Commerce Act and the Shipping Act depends not upon the question as to whether the litigant is the United States or a private individual but upon the character of the question to be determined and whether it is the intent of Congress that such questions should be determined by the administrative body.

The trial court cited: *Keogh vs. Chicago & Northwestern Railway Company et al.*, 260 U. S. 156; *United States vs. Borden Company*, 308 U. S. 188, *et seq.*; *Georgia vs. Pennsylvania Railroad Co., et al.*, 324 U. S. 439; *United States Alkali Export Association, Inc. et al. vs. United States*, 325 U. S. 196.

The cases cited afford no support to the decision reached by the trial court.

Keogh vs. Chicago & Northwestern Railway Company et al., *supra*, was decided in 1922. This Court said at page 161:

"* * * But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under §3, by injunction under §4, and by forfeiture under §6. That was settled by *United States vs. Trans-Missouri Freight Association*, 166 U. S. 290, and *United States vs. Joint Traffic Act Association*, 171 U. S. 505."

The Interstate Commerce Act at the time this decision was rendered contained no provision vesting in the Interstate Commerce Commission any power over a combination among competing railroad companies to fix rates.

Under Section 15 of the Shipping Act on the contrary the Maritime Board has the power to approve and by its approval to render lawful an agreement among competing ship lines to fix rates.

United States vs. Borden Co., *supra*, arose on indictment found against distributors of milk, the Associated Milk Dealers, Inc., a trade association of milk distributors, the Milk Dealers Bottle Exchange, the Pure Milk Association, a cooperative association of milk producers, the Milk Wagon Drivers Union, municipal officers of the City of Chicago and two persons who arbitrated a dispute between the major distributors and the Pure Milk Association.

The indictment charged a conspiracy to arbitrarily maintain and control artificial and non-competitive prices for fluid milk and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce. In an attack upon the indictment it was claimed that the production and marketing of agricultural products, including milk, had been removed from the purview of the Sher-

man Act by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §608b; also on the ground that the Pure Milk Association and its officers and agents were exempt from prosecution under the Sherman Act by reason of the Capper-Voilestead Act, 7 U. S. C. §§291, 292.

This Court sustained the indictment on grounds not applicable to the case at bar. The defendants who were charged with the conspiracy included persons and organizations not within the provisions of either of the Acts above mentioned and such of the defendants as were within the provisions of the Agricultural Marketing Agreement Act had failed to comply with its provisions. Furthermore, the Agricultural Marketing Agreement Act, unlike the Shipping Act, is a limited statute with specific reference to certain particular transactions, while the Shipping Act contains a method for the complete regulation of the Shipping Industry and prescribes penalties for its violation.

The decision of this Court in *Georgia vs. Pennsylvania Railroad Co., et al.*, 324 U. S. 439, was based upon the fact that the combination to fix rates charged in that case was not a matter over which the Interstate Commerce Commission had jurisdiction.

At page 455 this Court said:

"The relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled. She merely asks that the alleged rate-fixing combination and conspiracy among the defendant-carriers be enjoined. As we shall see, that is a matter over which the Commission has no jurisdiction. And an injunction designed to put an end to the conspiracy need not enjoin operation under established rates as

would have been the case had an injunction issued in *Central Transfer Co. v. Terminal R. Assn., supra.*"

At page 456 this Court said:

"* * * But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not *per se* exempt from the Sherman Act."

Subsequent to the decision in *Georgia vs. Pennsylvania Railroad Co., supra*, the Reed-Bulwinkle Act, 49 U. S. C. §5(b) (June 17, 1948), was enacted. This Act conferred power upon the Interstate Commerce Commission to approve agreements among competing carriers fixing rates and exempting the carriers who had received such approval from the provisions of the Sherman Act.

This power is similar to the power which was conferred upon the Maritime Board by Section 15 of the Shipping Act of 1916.

United States Alkali Export Association, Inc., et al. vs. United States, 325 U. S. 196, was instituted to restrain alleged violations of the Sherman Act. Motion was made to dismiss the complaint on the ground that, as claimed, exclusive jurisdiction of the matters charged therein was vested in the first instance in the Federal Trade Commission under Sections 1, 2 and 5 of the Webb-Pomerene Act, 15 U. S. C. §61, 62 and 65. This Court affirmed the trial court's denial of the motion. The decision of this Court was based on two grounds: (1) that the Webb-Pomerene Act did not

vest in the Federal Trade Commission the power to adjudicate any controversies, and (2) that the acts charged were not violations of the Webb-Pomerene Act but of the Sherman Act.

At page 206 this Court said:

"In determining whether the Webb-Pomerene Act curtailed the then existing authority of the United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations." See also page 208.

II.

The approval by the Shipping Board and the Maritime Commission of the defendants' Conference Agreement and amendments thereof exempts the defendants from prosecution under the Sherman Act with respect to conduct charged in the complaint.

As above stated, the complaint alleges that the defendants' Conference Agreement and its amendments have been approved under Section 15 of the Shipping Act (R. 11, Note 5).

Section 15 of the Shipping Act (appendix p. 2a) requires every common carrier by water, or other person subject to this Act to file with the commission a true copy of every agreement with another such carrier or other person subject to the Act, or modification or cancellation thereof, to

which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in the section is given as including understandings, conferences, and other arrangements.

The Section provides that the Commission may by order disapprove, cancel or modify any agreement or any modification or cancellation thereof whether or not previously approved by it that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be in violation of such Act and requires that the Commission shall approve all other agreements, modifications or cancellations.

The Section further provides that every agreement, modification or cancellation, lawful under such Section, shall be excepted from the provisions of Sections 1-11 and 15 of Title 15, U. S. Code (the Sherman Act) and amendments and acts supplementary thereto.

The attention of the Court is called to the fact that the Commission not only has the power but is required to approve agreements "controlling, regulating, preventing or destroying competition", if it determines that such agreements are in accord with the standards fixed by the Act for such approval.

The defendants' Conference Agreement (Exhibit A to complaint R. 10, par. 8) authorizes the parties thereto to pass upon any matter involving discriminations, tariffs, freights, brokerages or other charges or the regulation of transportation between the ports served by the members of the Conference.

Paragraph 9 of such Agreement (R. 11) authorizes the Conference to establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the Agreement, and all of the parties to such Agreement agree that they will be bound by the affirmative vote of the majority of their number upon such matters with the same force and effect as if expressly made a part of the Agreement.

The establishment under this Agreement of the "contract, non-contract" rates to which the plaintiff objects was merely the fixing of rates pursuant to paragraph 9 of the Agreement. It is not alleged in the complaint and it is not, in fact, true that these rates involved any discrimination among shippers for every shipper had the option either to sign an exclusive patronage agreement and ship at the lower rate or to refuse to sign such an agreement and pay the higher rate.

It is clear from the reports of the Maritime Board that that Board considered the "contract non-contract" rates merely as rates fixed by the Conferences pursuant to the provision of the Conference Agreements authorizing the fixing of rates by agreement.

In 1935 the United States Shipping Board which was then charged with the enforcement of the Shipping Act conducted an investigation under Section 19 of the Merchant Marine Act of 1920. The report of this investigation appears at 1 U. S. M. C. 470 *et seq.*

In the course of the investigation the Board considered the rates of the Far East Conference. Pages 479 and 480 of the report contain schedules of rates of the Far East Conference as compared with the rates of a competing line, designated as Table II and Table III. These rates are designated as conference contract rates.

At page 480 the Board said:

"It will be noted that in Tables II and III the rates of the conference are headed 'contract' rates. Prior to the collapse of the Far East Conference in 1931, it had been the practice of the conference to give on some commodities reduced or 'contract' rates to all shippers, large or small, who agreed to give all their business for a period of one year to the conference carriers. Effective September 1, 1932, as a result of the combined competition of Isbrandtsen-Moller and Ellerman & Bucknall, the conference revived this contract rate system and extended it to practically all commodities."

This report shows two things:

1. that the Shipping Board regarded the establishment of contract rates merely as an establishment of rates pursuant to the conference agreement of the Far East Conference.
2. that it regarded such establishment as entirely lawful.

In the recent report of the Federal Maritime Board in *Isbrandtsen Co., Inc. vs. North Atlantic Continental Rate Conference, et al.*, 3 F. M. B. 235; the Board, after a discussion of the contract rate system, and of decisions of its predecessors with reference thereto, said at page 241:

"Based on the interpretation above outlined, our predecessors since 1931 approved no fewer than 32 conference agreements which provide either speci-

cally or inferentially for the dual rate system—and of these agreements, 24 are now in effect and the respective conferences are making active use of the dual rate system.”

It will be noted that the Board in the above recited quotation referred to the approval of conference agreements which provided either *specifically or inferentially* for the dual rate system. The agreements which provided inferentially for the dual rate systems were undoubtedly the agreements which, like the Far East Conference agreement, authorized the members thereof to agree upon rates.

It thus appears that for many years the predecessors of the Federal Maritime Board have construed Section 15 of the Shipping Act not only as authorizing Conference agreements providing for agreement upon rates but also that such Conference agreements authorized agreement upon “contract non-contract” rates whether or not such “contract non-contract” rates were specifically mentioned in such agreements. The Shipping Act has been amended on numerous occasions since 1931. In fact, Section 15 was amended in 1936. The Congress, therefore, may be regarded as adopting the construction and application of the Act made by the administrative agency. All departments of the Government, until recently, have also acquiesced therein. If there were any ambiguity in the Act and we think there is none, the construction placed upon it by the successive administrative agencies would be deemed to express the intent of the Congress since in this respect no material change has been made in the Act.

See: *United States vs. Cerecedo Hermanos Y Compania*, 209 U. S. 337; *New Haven R. R. vs. Interstate Commerce Commission*, 200 U. S. 361; *National Lead Company vs. United States*, 252 U. S. 140; *Massachusetts Mutual Life*

Insurance Co. vs. United States, 288 U. S. 269; *Logan vs. Davis*, 233 U. S. 613; *Interstate Commerce Commission vs. Parker*, 326 U. S. 60, rehearing denied 326 U. S. 803.

The approval of the defendants' Conference Agreement authorizing the defendants to agree upon rates authorized them to agree upon the dual rate system. By virtue of such approval their conduct was rendered lawful. The approval by the Board is, of course, subject to direct review but is not subject to collateral attack. While the approval remains in effect, the defendants, as members of the Conference, are expressly exempted from the provisions of the Antitrust Act with respect to the dual rate system.

The Maritime Board, after the approval of a Conference Agreement, does not lose control of what is done under it.

The Board has authority under Section 21 of the Act, as amended (48 U. S. C. §820), to require any common carrier by water to file with it any periodic or special report or any account, record, rate or charge or any memorandum of facts or transactions appertaining to the business of such carrier or other persons subject to the Act. A penalty is provided for failure to file such report and a much larger penalty for filing a false report. On its own motion, without complaint, it may investigate any violation of the Act and is required, when complaint is filed with it, to make such investigation and to make such report as it deems proper.

If the members of a conference agreement are engaging in any conduct which in the judgment of the Maritime Board is contrary to the standards provided in Section 15 of the Act, it is its duty to cancel its approval of the conference contract unless such conduct is forthwith discontinued. If the members of the Conference continue to

operate under the contract after its cancellation, each member is subject to a penalty of \$1,000 a day.

The petitioners in the case at bar with respect to their motion are in a much stronger position than the defendants in the *United States Navigation Co. vs. Cunard Steamship Co., supra*. In that case the complaint, unlike the complaint in the case at bar, did not allege that the agreement made by the defendants fixing rates had been filed with or approved by the Shipping Board.

In the opinion in the *United States Navigation Co.* case this Court, after referring to the provisions of Section 15 of the Shipping Act, said at page 486:

“ * * * If there be a failure to file an agreement as required by §15, the board, as in the case of other violations of the act, is fully authorized by §22, *supra*, to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under §31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission.”

At page 487 this Court said:

“ * * * In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and ‘disapprove, cancel, or modify’ it, because of a failure of the contracting parties to file it as §15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of §22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper.”

III.

The History of the Shipping Act and the Debates in the House of Representatives and Senate while it was under consideration strongly support the Petitioner's position.

The Shipping Act of 1916 was enacted after a very thorough and able investigation of the Shipping Industry by the Committee on Merchant Marine and Fisheries of the House of Representatives, of which Congressman J. W. Alexander was Chairman. See House Resolution 587, 62nd Congress, Second Session.

The report of the Committee (Document 805—63rd Cong., Second Session) contains an exhaustive description of the Shipping Industry. Chapter 10 of the Report (page 231, *et seq.*), contains a summary of the methods of control adopted pursuant to shipping conferences and agreements and recommendations for proposed legislation.

"The foregoing chapters contain a description of 80 steamship agreements and conference arrangements, which, when considered collectively, show that as regards nearly every foreign trade route practically all the established lines operating to and from American ports work in harmonious cooperation, either through written or oral agreements, conference arrangements, or gentlemen's understandings. The few instances where two or more lines serve the same route and have denied the existence of written or oral agreements for the regulation of the trade, are exceptions and not the rule.

"An examination of the numerous aforementioned agreements and conference arrangements shows that they differ greatly in their details, especially since most of them are adapted to meet the needs of the

particular trades to which they apply, or the special requirements of the several lines which are parties to the arrangements. Aside from these differences of detail, however, all the agreements and arrangements show one unmistakable purpose, viz., the control of (1) competition between the lines which are parties to the agreement or conference, and (2) competition from lines which are outside of the conference."

It will be noted that the agreements considered by the Committee had two purposes:

1. the control of competition among the lines which were parties to the agreement or conference, and
2. the control of competition from lines which were outside of the conference.

At page 287 the report deals with the methods employed by the conferences to control competition from lines outside of the Conference. One method employed was the deferred rebate system which was condemned by the Committee and prohibited by the first paragraph of Section 14 of the Act, 46 U. S. C. §812. The term "Deferred rebate" is very carefully defined in this paragraph, as a rebate, the payment of which is deferred beyond the completion of the service for which it is paid and is made only if during both the period for which the rebate was computed and the period for deferment, the shipper has complied with the terms of the deferred rebate arrangement. The Committee also condemned the use of fighting ships which is also prohibited by the second paragraph of Section 14 of the Shipping Act.

Another method of controlling competition which was reported by the Committee consists of "contract non-contract" rates which are described as follows at page 290 of the Report:

"Such contracts are made for the account of all the lines in this agreement, each carrying its propor-

tion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i. e., are willing at all times to contract with all shippers on the same terms."

This method of competition was not condemned by the Committee.

On page 295 to 303, inclusive, the Committee discusses the advantages of shipping conferences and agreements in the American foreign trade. At page 304 to 307 the disadvantages of such conferences are discussed.

In the chapter devoted to the recommendations of the Committee with respect to the regulation of water carriers engaged in the foreign trade, at page 415 *et seq.* the Committee said:

"* * * Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses."

The Committee after referring to its enumeration of the advantages of the conference system said at page 416 and page 417:

"These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate

and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

Seven recommendations made by the Committee for the government of steamship carriers in the foreign trade of the United States appear on pages 419 to 421 of the report.

The second and third recommendations are as follows:

"(2) That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements

hereinafter referred to, be required to file for approval with the Interstate Commerce Commission a copy of all written agreements (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies. All modifications and cancellations of such agreements or understandings as may be made from time to time should also be promptly filed. The Commission should be empowered to order canceled any such agreements, or any parts thereof, that it may find to be discriminating or unfair in character, or detrimental to the commercial interests of the United States.

“(3) That the Interstate Commerce Commission be empowered to investigate fully complaints charging the unreasonableness or unfairness of rates, or to institute proceedings on its own initiative, and to order such rates changed if convinced that the rate under consideration is unreasonably high, or discriminating in character as between shippers, or ports, or between exporters of the United States and their foreign competitors; and to order restitution to shippers of all sums collected in excess of reasonable rates. This recommendation is also intended to extend to the supervision of freight classifications used by the lines, and the investigation of complaints charging refusal on the part of any carrier to properly adjust the rates between classes of commodities.”

The fourth recommendation was that rebating of freight rates be prohibited.

The fifth related to the investigatory powers to be given to the Interstate Commerce Commission. The sixth was that the use of fighting ships and deferred rebates be pro-

hibited and the seventh that adequate penalties be provided.

The bill introduced followed most but not all of the above mentioned recommendations of the Committee. During the debate in the House of Representatives, Mr. Alexander, Chairman of the Committee, after referring to the Committee's report said in part:

"* * * As a result of our investigation we were confronted with the question whether or not we should recognize the agreements existing between carriers by water or recommend that the Sherman antitrust law should be enforced against them and these combinations be broken up, and if that law was not ample or broad enough in its provisions to do so that the law should be amended.

"After giving thorough consideration to this grave question and after taking into consideration the arguments made before our committee by the ablest representatives of the foreign lines as well as of the domestic lines, we concluded that many of the provisions of the agreements under which combinations were operating were not objectionable; and hence we recommended reasonable regulation rather than that the combinations might be broken up. That decision was influenced by the consideration that if we would break up these combinations and restore destructive competition it would ultimately lead to consolidation and monopoly. Hence, after giving the question thorough consideration, we recommended that our water-borne commerce, domestic and foreign, should either be brought under the supervision of the Interstate Commerce Commission or under some other body having jurisdiction: * * *" (Congressional Record 64th Congress, First Session, page 8077.)

Mr. Burke, who was a member of the Committee, said in part:

"In the shipping bill now under debate there are two primary objects. The first primary purpose is the formation of a naval auxiliary reserve, and the second principal object of the bill is to vest in a board created by the bill proper and plenary authority and power to control, regulate, and supervise the American merchant marine in its business relations with shippers and competing lines. This power of regulation, control, and supervision is to be also exercised over the foreign merchant marine when within American ports, the general purposes of these powers being intended for the protection of shippers and competing lines from the various unfair practices now and heretofore characteristic of both American and foreign water carriers, and to incidentally build up and develop American commerce and transportation with such ports and countries as present the most advantageous opportunities" (Id., page 8099).

After mentioning deferred rebates, fighting ships, retaliation and the making of unjust and discriminatory contracts relative to space accommodations, and with respect to loading and handling of freight in proper condition, and with respect to adjustment and settlement of claims, Mr. Burke said:

"Your committee at the conclusion of such hearings and after consideration and due deliberation made its report to Congress upon the subject with many valuable recommendations. Among the recommendations made in such report to Congress were that laws should be passed prohibiting the grossest and most vicious of such unfair practices, and also recommending that laws be passed extending the jurisdiction of the Interstate Commerce Commission to regulate and control the rates for transportation by water carrier along the same lines and for the same purposes that jurisdiction has for many years been

conferred upon such commission in the regulation, control, and supervisions of railway rates. * * *

"The said shipping investigation disclosed conclusively that it was absolutely necessary that there should be a body of laws enacted relating to the regulation and control of the merchant marine and that a board should be created and empowered with authority to enforce laws that might be passed relating to the same, and to also investigate, regulate, and control both the domestic and foreign merchant marine service" (p. 8095).

It is worth noting that both in the House and the Senate opposition was expressed to the clause excepting approved agreements from the Sherman Law.

In the House Representative Mann, then the Republican Floor Leader, offered an amendment striking the clause excepting the enumerated agreements from the Sherman Law. The amendment came to a vote and was defeated by a vote of 209 to 161, 12 answering present and 52 members not voting (Cong. Rec. 64th Cong. 1st Sess. p. 8354).

Again, when the bill was pending before the Senate this exemption clause was vigorously attacked in debate by Senator Jones, a member of the Committee, and by Senator Cummins of Iowa. Senator Cummins offered the following amendment:

"Mr. President, I move to strike from Sec. 16 as follows: Beginning in line 18 on page 17, down to and including 3 on page 18. A single word of explanation. This is the part of the bill which repeals the antitrust law. On it I ask for the yeas and nays" (Cong. Rec. 64th Cong. 1st Sess. p. 12815).

The yeas and nays were ordered, the result was announced: yeas 23, nays 37, so Mr. Cummins' amendment was rejected.

It may be that these circumstances add nothing to the force of the bill itself. They only show that the question was not passed without due consideration by both Houses.

Conclusion.

We respectfully submit that the judgment of the District Court should be reversed, first, because the Shipping Act confers exclusive primary jurisdiction upon the Maritime Board to determine the lawfulness or unlawfulness of the acts charged in the complaint. The decision of the Federal Maritime Board is subject only to direct review by the Courts. Second, because the defendants' Conference Agreement, which authorizes the members thereof to fix rates by agreement, authorizes the agreement to fix "contract non-contract" rates and the conduct of the defendants in fixing such rates is expressly excepted from the provisions of the Sherman Antitrust laws.

Respectfully submitted,

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APPENDIX.

Pertinent Sections of the Shipping Act of 1916 and the Sherman Act.

"§14. Determination by commission as to violations

"The commission upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

"(1) Has violated any provision of section 812 of this title, or

"(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

"If the commission determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the commission shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the commission certifies that the violation has ceased or such combination, agreement, or understanding has been terminated." September 7, 1916, Chapter 451, Section 14a, as added June 5, 1920, Chapter 250, 41 Stat. 996, amended June 29, 1936, Chapter 258, 49 Stat. 1987, 46 U. S. C. 813.

“§15. Contracts between carriers filed with commission

“Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term ‘agreement’ in this section includes understandings, conferences, and other arrangements.

“The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

“Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

“All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action." September 7, 1916, Chapter 451, 39 Stat. 733, amended June 29, 1936, Chapter 858, 49 Stat. 1987. 46 U. S. C. 814.

"§16. Discriminatory acts prohibited

"It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

"That it shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

"Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent

thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense." September 7, 1916, Chapter 451, 39 Stat. 734; amended June 16, 1936, Chapter 581, 49 Stat. 1518, 46 U. S. C. 815.

"§17. Discriminatory rates prohibited; supervision by commission

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." September 7, 1916, Chapter 451, 39 Stat. 734; amended June 29, 1936, Chapter 858, §§204, 904, 49 Stat. 1987, 2016, 46 U. S. C. 816.

"§21. Reports by carriers required

"The commission may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof,

to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the commission. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default.

"Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than \$1,000, or imprisonment for not more than one year, or to both such fine and imprisonment." September 7, 1916, Chapter 451, Section 21, June 29, 1936, Chapter 858, §§204, 904, 49 Stat. 1987, 2016, 46 U. S. C. 820.

Sherman Act.

"§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public

policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U. S. C. 1.

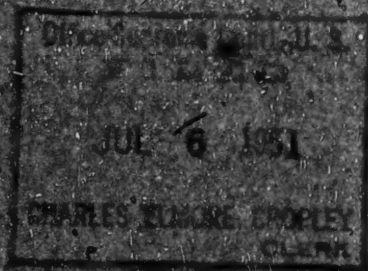
"§2. Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U. S. C. 2.

"§4. Jurisdiction of courts; duty of district attorneys; procedure

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney

General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." 15 U. S. C. 4.



No. 15 Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1951

F. J. EAST, COMPTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

FEDERAL MARITIME BOARD, INTERVENOR-RESPONDENT

**ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF
HABEAS CORPUS TO THE UNITED STATES COURT FOR THE
DISTRICT OF NEW JERSEY**

BRIEF FOR RESPONDENT FEDERAL MARITIME BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 15 Miscellaneous

FAR EAST CONFERENCE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

FEDERAL MARITIME BOARD, INTERVENOR-RESPONDENT

**ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT FOR THE
DISTRICT OF NEW JERSEY**

BRIEF FOR RESPONDENT FEDERAL MARITIME BOARD

OPINION BELOW

The opinion of the District Court is reported
at 94 F. Supp. 900.

JURISDICTION

The basis of this Court's jurisdiction to issue
the writ is set forth at page 3 of the Petition.

STATUTES INVOLVED

Sections 1, 2 and 4 of the Sherman Act (15
U. S. C. 1, 2, 4); sections 15 and 22 of the Ship-
ping Act (46 U. S. C. 814, 821).

QUESTIONS PRESENTED

Petitioning steamship carriers organized them-
selves into a conference by means of an agreement

approved by Federal Maritime Board¹ under section 15 of the Shipping Act (46 U. S. C. 814). The conference published a tariff containing two levels of freight rates, the lower rates being available only to shippers who agree to patronize member lines of the conference exclusively. The United States, through the Antitrust Division of the Department of Justice, sued to enjoin such dual rate system under section 4 of the Sherman Act (15 U. S. C. 4). Petitioners moved to dismiss the complaint. The District Court denied the motions. The case presents the following questions:

(a) Did the District Court have jurisdiction of the suit in the absence of prior resort by the Attorney General to a proceeding before the Board?

(b) If the District Court had jurisdiction, did it abuse its discretion in exercising such jurisdiction by refusing to dismiss the complaint?

(c) Does the complaint state a cause of action for injunctive relief under section 4 of the Sherman Act in the absence of an allegation that relief was first sought in a proceeding before the Board?

¹ Federal Maritime Board, established by Reorganization Plan 21 of 1950 (15 F. R. 3178) administers the Shipping Act, 1916, as successor to the Shipping Board, the Shipping Board Bureau of the Department of Commerce and the United States Maritime Commission. Each of these establishments is referred to herein as the Board.

STATEMENT

The case is accurately stated at pages 3-5 of the petition.

The Board intervened as a defendant in the District Court proceedings (R., pp. 94, 96, 97), and moved to dismiss the complaint (R. 93) on the ground that (a) the District Court lacked jurisdiction over the subject matter of the action and (b) the complaint failed to state a claim upon which relief could be granted. Its intervention and motion were based on the contention that the complaint related to matters committed by law to the Board's exclusive preliminary jurisdiction. The Board's motion was denied, as were similar motions by the defendant carriers (R., p. 104).

The Board did not file a petition for certiorari to review the order of the District Court. It was, however, named as respondent in the petition filed by the Far East Conference and its members. The Board is of opinion that the petition is well taken and that for the reasons therein and herein set forth, it should be granted.

ARGUMENT

(a) *This is a proper case for allowance of the writ.*

The basic reasons for allowing the writ are well stated in the petition. Several others suggest themselves and deserve brief mention.

The activities attacked by the complaint consist of a rate-making practice in ocean commerce commonly known as the "exclusive patronage," or "contract/non-contract" or "dual rate" system, by which conferences functioning under agreements approved by the Board under section 15 of the Shipping Act (46, U. S. C. 814)—which agreements after such approval are excepted from the antitrust laws—establish two scales of rates in their tariffs, the "contract" scale being lower than the "non-contract," usually by a percentage differential. The contract rates are paid by shippers who agree to ship in a particular trade by conference lines exclusively. The higher "non-contract" rates are paid by shippers who do not thus promise their exclusive patronage to the conference.

Depending upon the circumstances involved, the Board has sometimes forbidden and more often permitted the use of the dual rate system, and much of the foreign commerce of the United States is now conducted on the basis of contract and noncontract rates.

The dual-rate system has been a subject of controversy before the Board for many years, and has recently come under direct attack in the courts in two actions: (1) the present suit; and (2) *Isbrandtsen Co., Inc. v. United States* (S. D. N. Y.) 81 Supp. 544, app. dismissed 336 U. S. 941; 96 F. Supp. 883. *Isbrandtsen* is now docketed in this court on appeal by the Board and

others from the final order of a three-judge District Court enjoining use of the dual-rate system in the North Atlantic trade (96 F. Supp. 883).

Whereas in the present case the Attorney General challenges the system under the antitrust laws, *Isbrandtsen* involves an attack by a private plaintiff *not* under the antitrust laws but under section 14 Third of the Shipping Act (46 U. S. C. 812 Third). Since in *Isbrandtsen* the United States was a statutory defendant, the Board's orders were "defended" by the Attorney General through the Antitrust Division, the purported defense consisting of a confession of the Board's error. The Secretary of Agriculture intervened in the plaintiff's support.

Although the present case and *Isbrandtsen* present different, or at least potentially different issues, they are in substance complementary suits, dealing with related phases of a single basic subject—i. e., the lawfulness of the dual-rate system. The pendency of the *Isbrandtsen* appeal affords a convenient opportunity to review that case and this at the same time. In so doing, this court would serve a substantial public interest by furnishing final answers to unsettled questions of urgent concern to an important regulated industry, to the shipping public, and to the regulating agency.

The serious character of the issues involved is attested by the fact that this case has precipitated a judicial contest between the Board and the

Attorney General and that in *Isbrandtsen*, issue was joined not only between the Board and the Attorney General but between the Board and the Secretary of Agriculture as well.

(b) *The assumption of jurisdiction by the District Court, or, in any event, the exercise of such jurisdiction if it exists, should be restrained by this court.*

United States Navigation Co. v. Cunard, 284 U. S. 474, if it applies to this suit by the Government, means that the District Court is without jurisdiction, since the Court therein held (284 U. S. at 485) that the lawfulness of the dual-rate system, even when attacked under the Sherman Act as distinguished from the Shipping Act, was a question "within the exclusive preliminary jurisdiction of the Shipping Board," and that

"* * * Congress undoubtedly intended that the Board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority."
(p. 487)

The District Court thought that the Government, as distinguished from a private suitor, could not be forced to resort to an administrative remedy before the Board, because no such remedy was available to it—for the reason that proceedings before the Board are authorized upon the complaint of any "pers." (Shipping Act, sec.

22, 46 U. S. C. 821); and in the view of the District Court the United States is not a person. There is no such general rule. See *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 92-94; *Stanley v. Schwalby*, 147 U. S. 508, 517.

In *United States v. Interstate Commerce Commission*, 337 U. S. 426 (affirming 78 F. Supp. 580) the Government was recognized as a "person" entitled to maintain a complaint proceeding before the Interstate Commerce Commission under section 9 of the Interstate Commerce Act (49 U. S. C. 9)—a close counterpart of section 22 of the Shipping Act. See *United States Navigation Co. v. Cunard*, *supra*, p. 481. Further, the Government's status as a person, even under the antitrust laws, is implied (notwithstanding *United States v. Cooper Corp.*, 312 U. S. 600) by section 16 of the Clayton Act (15 U. S. C. 26) authorizing injunctive relief but providing that "nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, *except the United States*," to sue in equity for injunctive relief against common carriers regulated by the Interstate Commerce Commission.

The Maritime Board has on several occasions authorized intervention by the Attorney General in proceedings before the Board dealing with the dual rate system—a circumstance noted, but deemed immaterial, by the District Court. The Board's rules of practice (title 46 C. F. R., sec.

201.81) refer to interveners as "persons." Thus, the Government has been recognized as a person under the Shipping Act; and the administrative practice is entitled to respect in determining whether the Government is within the scope of a statute. *United States v. Cooper Corp., supra*, p. 605.

But whether the Attorney General has an unqualified legal right to file a complaint is unimportant. Section 22 of the Shipping Act authorizes proceedings by the Board on its own motion, and the Board hears the Attorney General when he asks to be heard. Its proceedings would be valid even if initiated on a complaint that the complainant had no standing to file. *United States v. N. Y. Central R. R.*, 272 U. S. 457, 462; *Isthmian S. S. Co. v. United States* (S. D. N. Y.), 53 F. 2d 251, 253. Since the Board would hear the Attorney General if asked to do so, his preliminary resort to the agency, under the *United States Navigation* doctrine, should not be waived.

Our contention is that in the absence of a proceeding first initiated before the Board, the District Court lacked jurisdiction of the cause. We take this position in reliance on what we consider to be the inescapable meaning of the *United States Navigation* decision. But if we are wrong, and *United States Navigation* does not establish a complete absence of jurisdiction in the District Court, it means at least that the *exercise* of juris-

diction by the District Court would be improper unless the controversy had been first submitted to the Board. See *Smith v. Hoboken R. R. Co.*, 328 U. S. 123, 129; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 428; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246; *United States v. Railway Express Agency* (D. C., Del.) 89 F. Supp. 981. Compare *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. —, 71 S. Ct. 762.

We have said that *United States Navigation* is a controlling precedent if it applies to suits by the Government. We see no reason for applying a different rule in civil cases where the Attorney General, acting through the Antitrust Division, is plaintiff, than in suits by private plaintiffs. Every reason stated in *United States Navigation* for dismissing the complaint there involved applies with equal force to the complaint in this suit. Further, this Court said in *United States Alkali Ass'n v. United States*, 325 U. S. 196, 204, that for a court to act in the first instance in a matter committed to administrative determination would involve "a frustration of the functions which Congress has directed the Commission to perform and of policy which Congress presumably sought to effectuate by their performance." This reasoning was applied to a civil antitrust suit by the *United States* and clearly means that as to matters within the primary jurisdiction of an

administrative body, the courts may not act, even at the Attorney General's behest, until the agency has acted.

(c) *The complaint fails to state a cause of action in the absence of an allegation that plaintiff resorted to proceedings before the Board before instituting the present suit.*

This Court recently noted in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, *supra* (341 U. S. at 249) that

"As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action."

In the present case, the defendant carriers moved to dismiss the complaint for want of jurisdiction in the Court and for failure of the complaint to state a cause of action (R., pp. 72-75); and a similar motion was made by the Board (R., p. 95). As heretofore noted, *United States Navigation* indicates that the jurisdictional objection is well-founded. *Montana-Dakota*, on the other hand, held on facts somewhat resembling those now before the Court, that the disability of a District Court to award relief under the Federal Power Act resulted not from a juris-

* In *Montana-Dakota*, the defendant moved to dismiss the complaint "for want of jurisdiction in that it failed to state a claim under federal law." 341 U. S. at 256.

ditional deficiency but from failure of the complaint to state a cause of action where the controversy, if litigable at all, would have been the sole concern of the Power Commission.

This Court concluded that the Power Commission could not have awarded the relief that plaintiff sought, but even so, the complaint (for reparations) in the District Court was held dismissable. The same result would have been indicated with even greater certainty had the case been one where the Power Commission had, as the Board indubitably has here, plenary power to grant a remedy. Shipping Act, sec. 22, 46 U. S. C. 821; *United States Navigation Co. v. Cunard*, *supra*.

This is not such a case as *Georgia v. Pennsylvania R. R. Co.*, 324 U. S. 439, which allowed the State to sue, as *parens patriae*, to enjoin antitrust violations by several railroads. That suit was permitted solely because the Interstate Commerce Commission had "no power to afford relief" from a conspiracy among the railroads (pp. 444, 455). The decision indicates definitively that if the Commission had had such power, this Court would have rejected Georgia's complaint for failure to state a cause of action. Compare *Central Transfer Co. v. Terminal R. R. Ass'n*, 288 U. S. 469.

Where, as here, the Board has jurisdiction to approve and has in fact approved the carrier's conference agreement, in consequence of which

the agreement is excepted from the antitrust laws (see Shipping Act, sec. 15, 46 U. S. C. 814), and the Board is empowered to investigate the acts set forth in the complaint and "to make such order as it deems proper"—i.e., to afford a complete remedy (Shipping Act, sec. 22, 46 U. S. C. 821)—the doctrine of preliminary resort to the agency applies with full force. To hold otherwise would be to cripple the Board in the exercise of a basic function lodged with it by statute, and to substitute the Antitrust Division for the Board as the administrative supervisor of conference activities. Since the complaint demands relief that the Board alone may grant in the first instance, it should be dismissed for failure to state a claim on which judicial relief can be awarded.

Accordingly, we join with petitioners in requesting that their petition for a writ of certiorari be granted.

Respectfully submitted.

FRANCIS S. WALKER,
General Counsel,
GEORGE F. GALLAND,

*Attorneys for Respondent Federal Maritime
Board.*

WASHINGTON 25, D. C.

JULY 6, 1951.

FILED

JUL 10 1951

No. 15 Misc.

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1951

FAR EAST CONFERENCE, UNITED STATES LINES
COMPANY, STATES MARINE CORPORATION, ET AL.,
PETITIONERS

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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FAR EAST CONFERENCE, UNITED STATES LINES
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UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the district court (R. 97) is reported at 94 F. Supp. 900.

JURISDICTION

The order of the district court sought to be reviewed was entered on March 7, 1951 (R. 104-5). The motion for leave to file a petition for a writ

of certiorari was filed on June 2, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

QUESTIONS PRESENTED

In an action by the United States under the Sherman Act, a conference of shipping lines and its members have been charged with agreeing to coerce shippers to patronize conference members exclusively by charging shippers who enter exclusive dealing contracts with conference members a "contract rate," and charging shippers who do not do so a discriminatively higher "non-contract rate." Motions to dismiss the action on the ground that the subject matter of the suit is exclusively within the jurisdiction of the Maritime Board were overruled. The questions presented are:

1. Whether the Shipping Act of 1916, as amended, deprives the district court of jurisdiction of this action.

2. Whether the above question is of a character which warrants grant of an extraordinary writ to review the interlocutory order of the district court overruling motions to dismiss.

STATUTES INVOLVED

The pertinent sections of the Sherman Act and of the Shipping Act, 1916, as amended, are set forth in the Appendix, *infra*, pp. 19-21.

STATEMENT

This is a suit by the United States against petitioners under Section 4 of the Sherman Act. Petitioners are 25 steamship lines which are associated together in petitioner Far East Conference under a conference agreement which was approved in 1922 by the United States Shipping Board, (a predecessor of the Federal Maritime Board) under the provisions of Section 15 of the Shipping Act, 1916, 39 Stat. 733, 734, 46 U.S.C. 814 (Compl., par. 29, R. 4-5).¹

The complaint alleges that petitioners have engaged in a continuing agreement and concert of action to control the transportation of cargo in the outbound Far East trade by establishing and maintaining a system of "contract rates," and higher "non-contract rates," the sole consideration for the enjoyment of the lower "contract rates" being the agreement of the shipper to patronize members of the Far East Conference exclusively in the outbound Far East trade. It is further charged that pursuant to this conspiracy shippers have in fact been coerced to enter into exclusive freight agreements,² and that the obligation imposed by the contracts has been enforced by petitioners by threats of withdrawal of "contract rates" and the imposition of oppressive fines and

¹ A copy of the conference agreement as amended is appended to the complaint (Ex. A, R. 8-16).

² A sample agreement was appended to the complaint as an exhibit (Ex. B, R. 16-20).

penalties for any breach. It was charged that the purpose of petitioners was to drive out of out-bound Far East trade steamship lines which were not parties to petitioners' combination, and that the exclusive patronage contracts and threats of penalties for deviation therefrom have eliminated competition, and thereby restrained and monopolized foreign trade of the United States. (R. 5-6.)

Petitioners filed answers (R. 21, 46) admitting their concerted use of the "contract rates" and "non-contract rates" and the exclusive dealing agreements with shippers, but asserting, *inter alia*, that this practice was in conformity with the Conference Agreement, and that the approval of that agreement by the Shipping Board exempts petitioners' activities from the reach of the Sherman Act (Ans., par. forty-eighth, R. 37; Ans., par. forty-ninth, R. 62).³ The United States filed a motion for judgment on the pleadings (R. 93).

Thereafter the United States Maritime Commission (now Federal Maritime Board) sought and was granted leave to intervene as a defendant (R. 94). Petitioners and the Maritime Commission then filed motions to dismiss the complaint on the ground, *inter alia*, that the court lacked jurisdiction of the subject matter (R. 72, 74, 95). After full briefing and argument of the pending motions,

³ Supplemental answers not material here were filed at a later time (R. 76, 85, 95).

the court below overruled the motions to dismiss, and also overruled the Government's motion for judgment on the pleadings (R. 97). With respect to the motions to dismiss, the court held that approval of agreements among the petitioners under Section 15 of the Shipping Act would at most furnish a legal defense in the antitrust action, but would not deprive the court of jurisdiction to entertain the action (R. 100). With respect to the motion for judgment on the pleadings the court held that the answers raised issues of law and fact which should be decided after a trial on the merits (R. 102).

ARGUMENT

I

The question which petitioners seek to bring before this Court is whether the Federal Maritime Board has exclusive primary jurisdiction of the subject matter of the Government's suit. Under Section 4 of the Sherman Act, federal district courts have jurisdiction of suits by the Government to prevent violations of the Act. The Shipping Act takes away this plenary jurisdiction only if it can be said that the latter Act withdraws from the purview of the Sherman Act all activities subject to regulation under the later statute, and thus *pro tanto* repeals the prohibitions of the Sherman Act. The Shipping Act does not expressly provide for such repeal, and we submit that it is not to be construed as impliedly effecting a repeal. This

Court has frequently passed upon and rejected the contention that other federal regulatory statutes have impliedly excluded from the Sherman Act the persons and activities subject to their provisions.

Before considering the decisions so holding, we note that the question presented for review is whether the Shipping Act in and of itself constitutes a bar to the Government's suit. The proposed petition for certiorari does not present the question of whether petitioners' discriminatory rate agreements (as distinguished from the general conference agreement, see note 1, *supra*, p. 3) have been approved under the Shipping Act and have thereby been exempted from the Sherman Act. Even if it be assumed, which the Government denies, that the Maritime Board⁴ has statutory authority to approve the particular type of agreements upon which the charges in the complaint are based, no such approval is set forth in the complaint, which is the record upon which the motion to dismiss must be determined.⁵ Accordingly, the

⁴ We use the term "Maritime Board" to refer to the Federal Maritime Board and its various predecessors.

⁵ The complaint charges agreement to control transportation between United States ports and the Far East by establishing and maintaining a system of "contract rates" and higher "non-contract rates," with grant of the lower "contract" rates conditioned upon the shipper's agreement to utilize petitioners' facilities exclusively. The allegation of the complaint (R. 5) that the Maritime Board had approved petitioners' Far East Conference Agreement does not show approval of this discriminatory system of rates. No language of the Conference Agreement authorizes, even by implication, use of such a system, and the prohibition of "unjust dis-

question presented on a review of the district court's order denying petitioners' motion to dismiss is whether the mere fact that petitioners' agreements may be within jurisdiction given the Maritime Board by the Shipping Act, bars the Govern-

crimination" against any shipper in paragraph 2 of the Agreement (R. 9) would seem to outlaw any such system.

The Maritime Board has at times approved use of the "contract" and "non-contract" rate system as employed by other shipping conferences. In *A/S J. Ludwig Mowinckels Rederi, et al. v. Isbrandtsen Co., Inc., et al.* and *Federal Maritime Board v. United States, et al.* (Nos. 134, 135, this Term) appeals are presented from the decision of a three-judge district court setting aside (on other grounds) an order of the Maritime Board which had approved use of the discriminatory rate system in the particular circumstances of that case. But there has been no uniform administrative practice. The opinion of the district court in that case (*sub nom. Isbrandtsen v. United States*, S.D.N.Y., Civ. No. 47-749) March 20, 1951, reviews the history of the "contract" and "non-contract" rate system before the Board and concludes that "the decisions of the Board (none of which approving a dual-rate provision has heretofore come to court) have lacked uniformity and consistency; and, in such circumstances, administrative interpretations have little weight."

In the court below petitioners and the Maritime Board contended that the Board's approval of the Far East Conference Agreement, which authorizes its members to agree upon rates and charges (pars. 1, 9, R. 8, 11), operates as an approval of any and all rates which the Conference may later adopt. Our answer to this is twofold. First, such approval, at the very most, extends only to rates filed with the Board, and the complaint does not show that petitioners' "contract," "non-contract" rates have been filed with the Board. Second, the suggested scope to be given the Board's approval of the Conference Agreement would be delegation run riot of public authority to private parties; it would mean that the Board had authorized a combination which "is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce" (*Fashion Originators' Guild, Inc. v. Federal Trade Commission*, 312 U.S. 457, 465). Moreover, the Government denies that the Board is authorized by the statute to approve the contract, no-contract system of rates used by petitioners. See Section 14, Third, of the Shipping Act (*infra*, p. 19).

ment, in the absence of exercise of such jurisdiction, from bringing a Sherman Act proceeding charging that the agreements violate that Act.

In many respects the Shipping Act parallels the Interstate Commerce Act, and it is therefore significant that the latter statute has been held not to preempt the field, to the exclusion of Government proceedings under the Sherman Act against regulated railroads. The Interstate Commerce Act, by virtue of amendments adopted subsequent to the Sherman Act, is of sweeping regulatory character, but it is settled that the Act gives the railroads no blanket immunity from the Sherman Act and that the Government may proceed against them for violation of its provisions. *United States v. Pacific & Arctic Co.*, 228 U.S. 87. See *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, 161-162; *Central Transfer Co. v. Terminal R.R. Assn.*, 288 U.S. 469, 474-475; *Terminal Warehouse Co. v. Pennsylvania R.R. Co.*, 297 U.S. 500, 513; *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456-458.

The early *Pacific & Arctic* case, *supra*, is an apt illustration that the doctrine of prior administrative determination, applicable to judicial proceedings based upon obligations imposed by a regulatory statute such as the Interstate Commerce Act, does not apply to a suit by the Government to enforce the Sherman Act. In that case the district court had dismissed an indictment containing two counts charging violation of the Sherman Act and

three counts charging violation of the Interstate Commerce Act, upon the theory that the acts charged against the defendants concerned discrimination in rates and through billing which the Interstate Commerce Act committed to the Interstate Commerce Commission for initial determination. This Court upheld the decision as to the Interstate Commerce Act counts but reversed as to the Sherman Act counts. The Court held that since the latter counts set forth a combination prohibited by the Sherman Act, the power of the Interstate Commerce Commission over the rates and through-traffic arrangements adopted by the defendants was irrelevant. *228 U.S. at pp. 104-105.

In *United States v. Borden Co.*, 308 U.S. 188, the district court had dismissed a Sherman Act indictment upon the ground that the Agricultural Marketing Agreement Act had vested in the Secretary of Agriculture such extensive regulatory power with respect to the marketing of milk that this Act had superseded the Sherman Act as to such marketing. This Court, in reversing, referred to the cardinal principle of construction that repeals by implication are not favored, and stated that a new law repeals the old only if there is "positive repugnancy" between their provisions and even then "only *pro tanto* to the extent of the repugnancy." *308 U.S. at pp. 198-199. The Court also pointed out that the Agricultural Act "expressly defines the extent to which its provisions make the anti-

trust laws inapplicable," and thus showed "beyond question how far Congress intended" that the later statute should supersede the earlier one (*id.*, at pp. 200, 201).⁶

The Court in the *Borden* case also held that the Copper-Volstead Act, which authorizes the members of agricultural cooperatives to combine together in marketing their products and provides for administrative action by the Secretary of Agriculture to determine whether action taken under the statute has resulted in undue enhancement of price, does not remove such cooperatives from the Sherman Act and does not substitute administrative action for judicial enforcement of the Sherman Act (*id.*, at pp. 203-206).

U. S. Alkali Association v. United States, 325 U.S. 196, involved the question whether the Webb-Pomerene Act conferred upon the Federal Trade Commission primary jurisdiction to pass upon violations of the Sherman Act by export associations. Under Section 5 of the Webb-Pomerene Act (15 U.S.C. 65) the Commission has the duty to investigate such violations, the power to make recommendations to the association for readjust-

⁶ The Shipping Act, like the Agricultural Act, contains an express exemption from the antitrust laws. The next to the last paragraph of Section 15 (*infra*, p. 21) grants such exemption as to any agreement "lawful under this section." But under the terms of the preceding paragraph of the section, an agreement is lawful "only when and as long as approved by" the Maritime Board, and, as we have previously stated (*supra*, pp. 6-8), in the present posture of the case it cannot be assumed that the agreements which the Government is challenging have been approved by the Board.

ment of its activities, and, if the recommendations are not accepted, the duty to refer the matter to the Attorney General. On its face, this provision is susceptible of the interpretation that exhaustion of the administrative procedure was intended to be a prerequisite to judicial enforcement of the Sherman Act against an export association. But this Court held that the powers vested in the Commission did not impliedly curtail the Attorney General's statutory authority to institute proceedings to prevent violation of the Act. The Court said (325 U.S. at p. 206):

A *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an anti-trust suit may appropriately be brought, would require a clear expression of that purpose by Congress.

Petitioners attempt to distinguish the *Pacific & Arctic*, *Borden* and *Alkali* cases upon the ground that the regulatory statutes which the defendants there relied upon gave to the respective administrative agencies no power of prohibition as to the conduct charged to be in violation of the Sherman Act, whereas the Shipping Act renders unlawful agreements which do not meet its standards (Pet. Br. 18-20).⁷ But this distinction

⁷ The decision in the *Borden* case, insofar as it relates to the Capper-Volstead Act, is not within the asserted distinction. The Capper-Volstead Act gives the Secretary of Agriculture power to prevent undue restraint of trade or monopoliza-

is without significance since offenses condemned by the Shipping Act are totally distinct from the offenses condemned by the Sherman Act. As to the latter Act, the Shipping Act gives the Board no power of enforcement, just as in the *Pacific & Arctic*, *Borden* and *Alkali* cases the respective regulatory statutes gave no such power to the administrative agencies there involved. And particular activity may and frequently does fall within the condemnation of two or more statutes.

Petitioners' major reliance is upon *U. S. Navigation Co., Inc. v. Cunard Steamship Co.*, 284 U.S. 474. The Court there held that the Shipping Act supersedes the antitrust laws with respect to *private* actions brought under Section 16 of the Clayton Act complaining of wrongs for which the Shipping Act provides a redress. The principal grounds given for this conclusion (pp. 480-483) were that the Shipping Act closely parallels the Interstate Commerce Act both in its general scope and purpose and in its terms; that the settled construction given the earlier Act must be applied to the later one; and that the Interstate Commerce Act had been construed to bar a private party from proceeding under the antitrust laws where the Interstate Commerce Act applied to,

tion by agricultural cooperatives, but this Court held that the authority thus conferred (in an area common with that of the Sherman Act) was auxiliary to, rather than an implied substitute for, the provisions of the Sherman Act (308 U.S. at p. 206).

and gave a remedy for, the acts of which, he complained.⁸

But the Court in the *Cunard* case made it clear that it was not passing upon the right of the Government to prosecute actions under the anti-trust laws based upon matters within the general purview of the Shipping Act. 284 U.S. at p. 483. Since it is now settled that the bar which the Interstate Commerce Act interposes to antitrust suits by private parties does not apply to suits by the Government (see cases cited, *supra*, p. 8), it seems clear that the "parallel" Shipping Act must be given the same interpretation.

The provisions of Section 16 of the Clayton Act, 15 U.S.C. 26, furnish strong confirmation for the distinction thus drawn between Government suit and private suit. Prior to the adoption of this section, the Government alone was authorized to maintain a suit to restrain violations of the antitrust laws. *Paine Lumber Co. v. Neal*, 244 U.S. 459. Section 16 authorized private parties to maintain such suits, but provided that no person, "except the United States," may bring suit for injunctive relief against any common carrier subject to the Interstate Commerce Act "in respect to any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." This limita-

⁸ See *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, cited in the *Cunard* case at pp. 483, 485.

tion had as its "obvious purpose" precluding any interference with activities of interstate carriers subject to the Commission's jurisdiction "except when the suit is brought by the Government itself." *Central Transfer Co. v. Terminal R. R. Assn.*, 288 U.S. 469, 475.

The distinction between a private and a Government antitrust suit attacking conduct of carriers which is within the area of federal regulation is not the product of judicial vagary. It rests on considerations of substance such as are determinative of the application of the Sherman Act when there is real or apparent conflict between the policy of that Act and the policy of other federal statutes having different objectives. In a suit under the antitrust laws by a private party against regulated carriers, there are persuasive reasons for concluding that Congress intended to make the carrier-regulating statute paramount—the regulatory statute's express provisions for redress of private rights and the emphasis which these statutes place upon uniformity of treatment among those served by a carrier. These considerations are not applicable to antitrust proceedings by the United States. Such suits are in vindication of public rights, for which the regulatory statutes provide no clear remedy.⁹ And the de-

⁹ Under the provisions and language of Section 22 of the Shipping Act, it is doubtful whether the United States, acting in its sovereign capacity, is a "person" entitled to file a complaint with the Maritime Board attacking the discriminatory character of rates adopted by steamship lines. *United States*

decision rendered in a Government antitrust suit will not give rise to inequality among those whom the carrier serves, a probable result of a private antitrust action.¹⁰

We further note that the issue raised in the present case does not involve technical and intricate matters of fact or require resolution of questions demanding exercise of administrative discretion. Whether petitioners' agreements have been "approved" by the Maritime Board within the meaning of Section 15 of the Shipping Act is a mixed question of law and fact to be determined on the evidence adduced at trial. Whether the Act authorizes the Board to approve such agreements is a question of statutory construction, in other words, a pure question of law.

The question of statutory construction last mentioned will undoubtedly be raised in *A/S J. Ludwig Mowinckels Rederi, et al. v. Isbrandtsen Co., Inc., et al.*, and *Federal Maritime Board v. United States, et al.*, (Nos. 134, 135, this Term).

v. Interstate Commerce Commission, 337 U.S. 426, which upheld the right of the United States to maintain an action for the recovery of injury suffered by it as a shipper of goods, involved altogether different considerations and statutory provisions. Nor does the United States have an adequate remedy under Section 22 merely because it may be entitled to intervene if proceedings thereunder have been instituted by a private party or by the Maritime Board.

¹⁰ In the *Keogh* case the Court said that recovery by a shipper in a triple damage suit under the antitrust laws would be the equivalent of a rebate, stringently prohibited by the Interstate Commerce Act. "Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." 260 U.S. at p. 163.

which are appeals from the decision of a three-judge district court setting aside an order of the Board. See note 5, *supra*, p. 7. These appeals from a final judgment on a full record would seem to present an appropriate opportunity for early resolution of this issue without the necessity for granting an extraordinary writ to review the instant case at a premature stage.

II

There is no doubt that this Court is empowered by 28 U.S.C. 1651(a) to issue a common-law writ to review an interlocutory order of the character here involved. *U. S. Alkali Assn. v. United States*, 325 U.S. 196. But the common-law writs which may be issued in aid of the Court's appellate jurisdiction are extraordinary remedies to be reserved for "really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260. They are ordinarily to be used only when "the circumstances imperatively demand that form of interposition * * * to correct excesses of jurisdiction and in furtherance of justice." *In re Chetwood*, 165 U.S. 443, 462.

The Court has always been reluctant to use the extraordinary remedies authorized by 28 U.S.C. 1651(a) to bring up for review interlocutory rulings in proceedings as to which Congress has permitted appeals only from final judgments. The present attempt to obtain review of denial of a motion to dismiss an antitrust action is such a

case. By the Expediting Act, 15 U.S.C. 29, Congress "limited the right of review to an appeal from the decree which disposed of all matters; see *Collins v. Miller*, 252 U.S. 364; and it precluded the possibility of an appeal * * * from an interlocutory decree." *United States v. California Co-Operative Canneries*, 279 U.S. 553, 558. To permit review of the present order would "thwart the Congressional policy against piecemeal appeals" and would be a "plain evasion" of the enactment of Congress that only final judgments be brought up for appellate review. *Rocke v. Evaporated Milk Assn.*, 319 U.S. 21, 30; *Bank of Columbia v. Sweeney*, 1 Pet. 567, 569.

We have shown under point I that the decision below is plainly correct, and there is no conflict of decisions. We submit that the motion for leave to file should be rejected, not only because of the policy against piecemeal appellate review and the related policy of confining review by extraordinary writ to questions of broad public importance, but also because the facts adduced at the trial of this case are likely to shed illumination on the point of primary jurisdiction as to which review is sought. On appeal from the district court's final decision, this Court will be in a better position than it now is to exercise an informed judgment on the question raised by the proposed petition for writ of certiorari if that question is then presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for leave to file petition for writ of certiorari should be denied.

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JULY, 1951.

APPENDIX

Section 4 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations.

* * *. [15 U. S. C. 4.]

The Shipping Act, 1916, 39 Stat. 728, as amended, 41 Stat. 996, 46 U.S.C. 801 *et seq.*, provides in part as follows:

Sec. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * *

Third. Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason. [46 U. S. C. 812.]

Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the [Federal Maritime Board] * * *, a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this

Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action. [46 U. S. C. 814.]

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No. 15 Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1951

FAB EAST CONFERENCE ET AL., PETITIONERS

UNITED STATES OF AMERICA, RESPONDENT

FEDERAL MARITIME BOARD, INTERVENOR-
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR RESPONDENT FEDERAL MARITIME BOARD

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Code of Federal Regulations:

Title 46, Sec. 201.81-----

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 15 Miscellaneous

FAR EAST CONFERENCE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

FEDERAL MARITIME BOARD, INTERVENOR-
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR RESPONDENT FEDERAL MARITIME BOARD

OPINION BELOW

The opinion of the District Court is reported
at 94 F. Supp. 900.

JURISDICTION

This Court issued the writ of certiorari pursuant to Section 1651 (a) of Title 28, U. S. Code; *United States Alkali Export Assn. v. United States*, 325 U. S. 196; and *DeBeers Consolidated Mines v. United States*, 325 U. S. 212.

STATUTES INVOLVED

Sections 1, 2 and 4 of the Sherman Act (15 U. S. C. 1, 2, 4); sections 14, 15 and 22 of the Shipping Act (46 U. S. C. 812, 814, 821). These statutes are set forth in Appendix A.

QUESTIONS PRESENTED

Petitioning steamship carriers in 1922 organized themselves into a conference by means of an agreement approved by Federal Maritime Board¹ under section 15 of the Shipping Act, 1916 (46 U. S. C. 814). The conference published a tariff containing two levels of freight rates, the lower rates being available only to shippers who agree to patronize member lines of the conference exclusively. The United States, through the Anti-trust Division of the Department of Justice, sued in 1948 to enjoin such dual rate system under section 4 of the Sherman Act (15 U. S. C. 4). The Board, as the agency responsible under the Shipping Act for administration of the steamship conference system, intervened as a defendant under Rule 24 of the Federal Rules of Civil Procedure (R., 94). The Board and the defendant lines (petitioners here) moved to dismiss the complaint (R., 72-76, 95). The District Court

¹ Federal Maritime Board, established by Reorganization Plan 21 of 1950 (15 F. R. 3178) administers the Shipping Act, 1916, as successor to the Shipping Board, the Shipping Board Bureau of the Department of Commerce and the United States Maritime Commission. Each of these establishments is referred to herein as the Board.

denied the motions (R., 104-5)—as it also denied a motion by the Government for judgment on the pleadings. The Government did not seek review of the District Court's order insofar as it denied the latter motion. The writ of certiorari brings the order here for review only insofar as it denied the motion to dismiss the complaint.

The case presents the following questions:

(a) Did the District Court have jurisdiction of the suit in the absence of prior resort by the Attorney General to a proceeding before the Board?

(b) If the District Court had jurisdiction, did it abuse its discretion in exercising such jurisdiction by refusing to dismiss the complaint?

(c) Does the complaint state a cause of action for injunctive relief under section 4 of the Sherman Act in the absence of an allegation that relief was first sought in a proceeding before the Board?

STATEMENT

The Board's motion to dismiss the complaint (R., 95) was made on the grounds that (a) the District Court lacked jurisdiction over the subject matter of the action and (b) the complaint failed to state a claim upon which relief could be granted. These were substantially the same grounds as those on which the motions of the conference and its member lines were founded. Its intervention and motion were based on the contention that the complaint related to matters com-

mitted by law to the Board's exclusive preliminary jurisdiction—the Board having approved the defendants' conference agreement under section 15 of the Shipping Act (46 U. S. C. 814), thereby exempting it from the antitrust laws. The Board did not file a petition for certiorari to review the order of the District Court denying its motion to dismiss; but it was named as respondent in, and gave its support to, a petition of the Far East Conference and its members for leave to file such a writ. That petition was granted and a writ issued accordingly (R., 105).

The Board contends that if the present suit should be allowed, the Board's chief regulatory function—i. e., administration of steamship conference system—would be effectively transferred from the Board to the Attorney General, and that this result would involve “a frustration of the functions which Congress has directed the [Board] to perform and of the policy which Congress presumably sought to effectuate by their performance.” *United States Alkali Export Assn. v. United States*, 325 U. S. 196, 204.

The motions to dismiss the complaint relied chiefly upon *United States Navigation Co. v. Cunard S. S. Co., Ltd.*, 284 U. S. 474, in which a private plaintiff sued under Section 16 of the Clayton Act (15 U. S. C. 26) for an injunction to restrain a combination of steamship lines from using a dual-rate, exclusive patronage system of ocean freight rates, of the type described in the

instant complaint. The case differed from the present suit only in that (1) the plaintiff was a private shipping company rather than the Government of the United States; and (2) it did not appear in *United States Navigation*, as it does appear here, that the defendant steamship lines acted pursuant to an approved conference agreement.²

This Court dismissed the *United States Navigation* complaint because it related to matters "*within the exclusive preliminary jurisdiction of the Shipping Board*," a predecessor of the Federal Maritime Board, and because the plaintiff's remedy was that afforded by the Shipping Act, "*which to that extent supersedes the antitrust laws*." (284 U. S. at 485).³

The Board's motion to dismiss the present complaint on jurisdictional grounds was based upon the explicit ruling in *United States Navigation* that the subject matter of such a suit as this fell within the Board's exclusive preliminary jurisdiction (284 U. S. at 485).

The motion to dismiss for failure of the complaint to state a cause of action was based on the equally explicit ruling in *United States Navigation* that with respect to such facts as those here (and

² Conference agreements are legalized and exempted from the antitrust laws, by section 15 of the Shipping Act, 1916 (46 U. S. C. 814), when approved by the Board.

³ Emphasis is ours, here and in other quotations, except as specifically noted.

there) involved, the Shipping Act *supersedes* the Sherman Act.

The District Court held that it nevertheless had jurisdiction of the complaint because (1) the mere fact of governmental regulation does not wholly exempt a regulated industry from the Sherman Act; and (2) the exemption conferred upon the shipping industry by the Shipping Act may not be construed as a restriction upon the jurisdiction of the District Court.

The District Court declined to rule that the complaint fails to state a cause of action, because (1) the filing by the Government of a complaint for injunctive relief against violations of the Sherman Act is explicitly authorized by Section 4 of that Act (15 U. S. C. 4); (2) the Government's right to sue under Section 4 of the Sherman Act could not have been superseded by any remedy under the Shipping Act because under Section 22 of that Act (46 U. S. C. 821), the Government is not a "person" entitled to maintain a remedial proceeding before the Board to restrain Shipping Act violations; and (3) although the conference agreement may be within the antitrust exemption conferred by the Shipping Act, "it does not follow that all conduct of the defendants and the

* For a recent discussion of the distinction, in a related context, between want of jurisdiction in a court, and failure to state a claim on which relief can be granted, see *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246.

practices in which they may be concertedly engaged are exempt from the provisions of Section 1 of the Sherman Act."

SUMMARY OF ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE DISMISSED THE COMPLAINT ON AUTHORITY OF *UNITED STATES NAVIGATION CO. v. CUNARD S. S. CO., LTD.* 284 U. S. 474.

(A) ALTHOUGH *UNITED STATES NAVIGATION* WAS A SUIT INSTITUTED BY A PRIVATE PARTY, IT NEVERTHELESS REQUIRES DISMISSAL OF THE ATTORNEY GENERAL'S COMPLAINT IN THE PRESENT CASE

United States Navigation was a suit by a private litigant against a group of steamship lines, under section 16 of the Clayton Act, charging a combination and conspiracy among the defendant steamship lines, in violation of the Sherman Act, to exclude the plaintiff from an ocean trade route by means of the dual-rate, exclusive patronage system. This court held that the suit could not be maintained because the matters set forth in the complaint were within the exclusive primary jurisdiction of the Shipping Board. That decision controls the present case.

The court of appeals for the Second Circuit had stated in the same case that although the *United States Navigation* suit was not maintainable by a private party, it would have been maintainable by the Government. This court rejected that dictum, and left the question open.

United States Navigation is applicable here because the reasons for disallowing the suit under the Sherman Act all pertained to the nature of

the subject matter and had nothing to do with the plaintiff's status as a private litigant rather than an agency of the Government. This Court held that the facts presented a case for the exercise of expert judgment and administrative discretion by the Board as administrator of the Shipping Act, which Act was explicitly characterized as superseding the antitrust laws with respect to the acts charged against the defendants by the bill of complaint.

The District Court refused to dismiss the present complaint on the basis of the Board's exclusive preliminary jurisdiction, for the reason that section 4 of the Sherman Act explicitly confers upon the District Courts jurisdiction to grant injunctive relief against antitrust violations at the Government's suit. Section 16 of the Clayton Act conferred similar authority with respect to suits by private parties, upon the District Court which passed upon the *United States Navigation* complaint, but this Court held that nevertheless the case was one for the Board rather than for the court. If the Board had primary standing to pass upon the facts in *United States Navigation*, it has the same standing here.

The Board contends that *United States Navigation* means that the District Court wholly lacks jurisdiction of the present cause until after the Board has acted. In any event, the case means no less than the exercise of jurisdiction constitutes an abuse of discretion until the case has

first been referred to and passed upon by the Board. *Smith v. Hoboken R. R. Co.*, 328 U. S. 123, 129, 133; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 428; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 266-267. See also *United States v. Railway Express Agency* (D. C., Del.) 89 F. Supp. 981; and compare *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. 341.

(B) DECISIONS OF THIS COURT PRIOR TO UNITED STATES NAVIGATION WOULD HAVE NECESSITATED DISMISSAL OF THE COMPLAINT IN THAT CASE EVEN IF THE SUIT HAD BEEN INSTITUTED BY THE ATTORNEY GENERAL RATHER THAN BY A PRIVATE PARTY

The decisions of this Court antedating *United States Navigation* had uniformly prohibited the Attorney General, acting under the anti-trust laws and the criminal provisions of the Interstate Commerce Act, from encroaching upon the primary administrative jurisdiction of the Interstate Commerce Commission. *United States v. Pacific & Artic Railway & Navigation Co.*, 228 U. S. 87; *United States v. St. Louis Terminal*, 224 U. S. 383, and 236 U. S. 194; *Terminal Railroad Ass'n. of St. Louis v. United States*, 266 U. S. 17. These decisions explain the refusal of this Court in *United States Navigation* to accept the dictum of the Circuit Court of Appeals that an opposite result would have been warranted had the suit been instituted by the Government rather than by a private plaintiff.

(C) THE APPLICABILITY OF THE UNITED STATES NAVIGATION DOCTRINE TO A SUIT BY THE ATTORNEY GENERAL HAS NOT BEEN AFFECTED BY SUBSEQUENT DECISIONS OF THIS COURT

Cases subsequent to *United States Navigation* have not impaired the authority of that decision. *United States Alkali Export Assn. v. United States*, 325 U. S. 196, and *United States v. Borden Co.*, 308 U. S. 188, on which the Attorney General has hitherto relied, do not support his contention that the doctrine of exclusive primary jurisdiction in administrative bodies is inapplicable to the Government when it sues in court through the Attorney General. *Alkali* turned primarily upon the point that the Federal Trade Commission, which was claimed to have exclusive primary jurisdiction under the Webb-Pomerene Act, lacked power to afford a complete remedy for the wrongs charged against the defendants (in contrast to the Maritime Board's power to afford a complete remedy here). *Borden* was decided on the grounds that (1) nonexempt classes of persons sought to rely upon an exemption from the antitrust laws and (2) the defendants had failed to make the Secretary of Agriculture a party to a marketing agreement. (Further, the statute involved imposed no penalties that could be regarded as substitutes for those of the antitrust laws). Accordingly, this Court refused to hold that the defendants were exempt from the antitrust laws or that their conduct was within the Secretary's exclusive jurisdiction. In neither *Borden* nor *Alkali* did this court announce or suggest a rule

that the Government is excused from preliminary resort to its own administrative agencies in cases within their jurisdiction.

(D) THE DISTRICT COURT WAS IN ERROR IN HOLDING THAT THE GOVERNMENT WAS WITHOUT A REMEDY UNDER SECTION 22 OF THE SHIPPING ACT

The District Court held that the Attorney General could not be forced to pursue an administrative remedy before the Board, for the reason that no such remedy was available to him. This conclusion was founded on Section 22 of the Shipping Act, which confers the right to file a complaint before the Board upon "any person." The District Court held that the United States is not a person under Section 22.

There is no such general rule as that upon which the District Court relied. See *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 92-94; *Stanley v. Schwalby*, 147 U. S. 508, 517. The United States was held to be a person for the purpose of filing a complaint for reparation before the Interstate Commerce Commission under Section 9 of the Interstate Commerce Act (49 U. S. C. 9), in *United States v. Interstate Commerce Commission*, 337 U. S. 426. Further, Section 16 of the Clayton Act (15 U. S. C. 26) inferentially recognizes the United States as a person in providing that no person except the United States may sue thereunder for equitable relief against common carriers regulated by the Interstate Commerce Commission.

The Maritime Board has at least twice admitted the Attorney General to intervention in its own proceedings, thus recognizing him as a person under its own rules. Such administrative recognition is entitled to judicial respect.

To hold for the purposes of this case that the United States is not a person under Section 22 of the Shipping Act is unnecessary and, moreover, is improvident, since the ruling would needlessly curtail the rights of the Government in other situations, including its right to seek reparation under the Shipping Act against carriers subject to the Board's jurisdiction.

It is immaterial, however, whether the Attorney General is entitled as of right to be recognized as a person under the Shipping Act, since the matters here involved are the primary responsibility of the Board under the rule of *United States Navigation*, and the Board's policing powers under the Shipping Act are exercised in the right of the United States as fully as are the functions of the Attorney General. Accordingly, the fact that the Attorney General might not have a right to initiate Board proceedings does not mean that the United States has no such right—since, with respect to matters covered by the Shipping Act, the Board is the United States.

(E) THE CONFERENCE AGREEMENT OF THE FAR EAST CONFERENCE
AUTHORIZES THE USE OF THE DUAL-RATE SYSTEM

The Attorney General claimed below that the present case is removed from the Shipping Act and subjected to the Sherman Act because the basic agreement of the Far East Conference, which the Board approved, does not authorize the use of the dual rate exclusive patronage system. While this fact, if it were a fact, would be immaterial under *United States Navigation*, the truth is that the system is authorized by the conference agreement, and therefore by the Board's order approving such agreement. The agreement provides generally that the conference may fix rates. The type of rates to be fixed is clearly a matter for regulation and control by the Board. By settled administrative practice, the Board has interpreted the agreement as authorizing dual rates, and in the circumstances of this case, its own interpretation of its own order is controlling. *United States v. Eaton*, 169 U. S. 331, 343; *American Telephone & Telegraph Co. v. United States*, 299, U. S. 232, 242; *National Labor Relations Board v. Virginia Electric Power Co.*, 314 U. S. 469, 479; *Byers Transportation Co. v. United States*, (D. C., W. D. Mo.) 48 F. Supp. 550, 553. If the Board's order did not in fact authorize the dual rate system, the Board could amend its order at any time, and any decision of this Court based upon the fact that the Board had not amended its order would be merely

an "idle gesture." *Georgia v. Pennsylvania R. R. Co.*, 324 U. S. 439, 461.

II. THE BOARD HAS POWER UNDER SECTION 14 THIRD AND SECTION 15 OF THE SHIPPING ACT TO APPROVE CONFERENCE AGREEMENTS PROVIDING FOR THE DUAL-RATE SYSTEM

The Attorney General contended before the District Court that the Board's order approving the conference agreement should not be construed as authorizing the dual rate system, since if the order purported to have such effect, it was in excess of the Board's authority under Sections 14 Third and 15 of the Shipping Act.

The Board had full authority to issue an order approving the dual-rate system. The argument in support of such authority is fully covered in the Board's brief in *Federal Maritime Board v. United States of America*, No. 135 on this Court's current docket. Since that case will be argued at the same time as the present case, we refer to the argument as set forth in that brief, without further elaboration here.

This case presents the problem of making "a workable allocation of business" between the courts and an administrative agency of the Government. *Civil Aeronautics Board v. Modern Air Transport*, 179 F. 2d 622, 625. Such allocation requires recognition that courts and administrative agencies "are to be deemed collaborative instrumentalities of justice" and that "the appro-

appropriate independence of each should be respected by the other." *United States v. Morgan*, 313 U. S. 409, 422; also 307 U. S. 183, 191. A workable allocation of business between the courts and the Board in the present case demands full recognition of the Board's unquestioned primary jurisdiction under the *United States Navigation* rule. The collaborative status of the courts and the Board will be fully preserved by allowing the Board to make the first inquiry and determination, saving to the courts the power to assure the Board's compliance with law through their power to review its orders. Only by recognition of the Board's primary jurisdiction can the courts assure that the overlapping provisions of the Shipping Act and the antitrust laws will be fairly applied, and that the maritime interests of the United States will be regulated and protected in the manner intended by Congress.

ARGUMENT

POINT I

THE DISTRICT COURT SHOULD HAVE DISMISSED THE COMPLAINT ON AUTHORITY OF *UNITED STATES NAVIGATION CO. v. CUNARD S. S. CO., LTD.*, 284 U. S. 474

(A) ALTHOUGH *UNITED STATES NAVIGATION* WAS A SUIT INSTITUTED BY A PRIVATE PARTY, IT NEVERTHELESS REQUIRES DISMISSAL OF THE ATTORNEY GENERAL'S COMPLAINT IN THE PRESENT CASE

The only difference between the present suit and *United States Navigation* which remotely tends to support the District Court's refusal to dismiss is that here the plaintiff is the United States, acting through the Attorney General under

section 4 of the Sherman Act, whereas there the plaintiff was a private party, suing under section 16 of the Clayton Act (15 U. S. C. 26.) The several questions in the present case thus blend into one composite question: *Whether the doctrine that normally requires preliminary resort to a regulatory agency in cases falling within its special competence, is applicable as against the Government of the United States acting through the Attorney General.* We contend that it is—while acknowledging that *United States Navigation* did not expressly settle the issue.

That case reached this Court via the Court of Appeals for the Second Circuit (*United States Navigation Co. v. Cunard S. S. Co., Ltd.*, 50 F. 2d 83) which, in rejecting the argument that a private suitor had a right to an injunction against the defendants' conduct said (p. 89):

Doubtless the government would have such a right, but it does not follow that the right inheres in private persons.

The Supreme Court did not accept the conclusion that "the government would have such a right." It said (284 U. S. 474, 486):

But a failure to file such an agreement with the board will not afford ground for an injunction under section 16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of such a suit, being predicated

upon a violation of the antitrust laws, a right which, as we have seen, does not here exist.

In rejecting the dictum of the Circuit Court of Appeals and expressly leaving the question open, the Supreme Court necessarily cast doubt upon the proposition that the government would have stood in a better position than a private plaintiff.

United States Navigation is therefore open to examination to determine whether the reasoning on which it rests would have supported a different rule had the Government, instead of United States Navigation Company, been the plaintiff. The reasons for the decision were:

(1) The inquiry "is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if it is left to the Commission" (284 U. S. at p. 482).

(2) The determination "is reached ordinarily on voluminous and conflicting evidence, for the appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts" (284 U. S. at p. 482).

(3) "The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision" (284 U. S. at p. 483).

(4) "Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal" (284 U. S. at p. 485).

(5) The remedy for the conditions alleged in the complaint "is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws" (284 U. S. at p. 485).

(6) "The matter is therefore within the exclusive preliminary jurisdiction of the Shipping Board" (284 U. S. at p. 485).

None of these reasons bears any relationship to the identity of the plaintiff or to the question whether the plaintiff represents a private interest or public authority. In the present case, as in *United States Navigation*, the question is equally "one of fact and of discretion in technical matters," no matter who brings the suit. Uniformity of decision can be secured only if the question is left to the Maritime Board, no matter who brings the suit. The determination requires

the same appreciation of and acquaintance with intricate facts of transportation, no matter who brings the suit. The knowledge found in "a body of experts" is equally requisite to the decision, no matter who brings the suit. The accomplishment of the Congressional purpose requires the same "comprehensive study of an expert body continuously employed in administrative supervision", no matter who brings the suit. The economic relations, the facts peculiar to the shipping business or its history, the competitive conditions in foreign trade, the technical facts and usages of the industry, are identical, no matter who brings the suit. We find no basis whatever to justify a ruling in this case different from the ruling in *United States Navigation*, based upon the circumstance that this suit was instituted by the Government, whereas the other was not.

One reason cited by the District Court for refusing to dismiss the complaint on authority of *United States Navigation*, was that Section 4 of the Sherman Act explicitly vests in the District Courts jurisdiction to prevent and restrain violations thereof, and further, imposes upon United States District Attorneys the duty to institute equity proceedings to prevent and restrain such violations. The Court said (94 F. Supp. at p. 902):

The language of the statute is free from ambiguity and there can be no doubt as

to either the right of the United States to maintain suits under the antitrust laws or the jurisdiction of this court to entertain them.

The Court's reasoning, while based upon an accurate reading of the statutory language, ignores the entire body of law dealing with exclusive primary jurisdiction of administrative agencies. While it is true that section 4 of the Sherman Act authorizes the United States to maintain suits in equity to restrain Sherman Act violations, it was no less true in *United States Navigation* that Section 16 of the Clayton Act, upon which that suit was founded, explicitly authorized "any person * * * to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * *." Nevertheless, this Court refused to allow the action, but held that the question in the first instance was exclusively for the Board, for the reasons above stated—one of which was that insofar as the Shipping Act covered the allegations of the complaint, it superseded the antitrust laws. Since the facts are essentially the same in both cases, it cannot be denied that if the antitrust laws were superseded in *United States Navigation*, they are superseded here—and the superseded provisions must include section 4 of the Sherman Act precisely as in *United States Navi-*

gation they included section 16 of the Clayton Act.

It has been true, we believe, of every case applying the rule of primary administrative jurisdiction since *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, that the plaintiff proceeded under a statute purporting to authorize a suit *in court*. Nevertheless, this Court has engrafted an exception upon every such statutory authorization to the effect that where the question presented demands the exercise of administrative discretion in technical matters under the jurisdiction of an administrative agency, adjudication must be had by the agency before the courts can act.³ This rule, as the *Texas & Pacific* decision, *supra*, indicates, was applied from the outset even in cases arising under the Interstate Commerce Act which provides (49 U. S. C. 22) that nothing contained in that Act should abridge or alter existing common law or statutory remedies, but that the provisions of the Act are in addition to such remedies. The Shipping Act, however, contains no counterpart of that provision, and therefore presents a stronger case than those under the Interstate Commerce Act, for insistence upon preliminary resort to the administrative body having jurisdiction. *United States Navigation*

³ See cases cited in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 260; and in *Lichten v. Eastern Airlines* (2d Cir., 1951), 189 F. 2d 939, 946, note 21; and in annotation on the doctrine of primary administrative jurisdiction, 94 L. ed. 806.

Co. v. Cunard S. S. Co., supra, (284 U. S. at p. 485).

This Court in *Montana-Dakota Utilites Co. v. Northwestern Public Service Co., supra*, recently emphasized the need to distinguish, in cases involving the doctrine of primary administrative jurisdiction, between (1) lack of jurisdiction in a court, and (2) failure of a complaint to state a cause of action. Mr. Justice Jackson said (241 U. S. at 249):

As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has. In the words of Mr. Justice Holmes, “* * * if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good.

or bad." *The Fair v. Kohler Die & S. Co.*, 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 S. Ct. 410. See also *Hurn v. Oursler*, 289 U. S. 238, 240 77 L. ed. 1148, 1150, 53 S. Ct. 586. Even a patently frivolous complaint might be sufficient to confer power to make a final decision that it is of that nature, binding as *res judicata* on the parties.

The motion to dismiss the present complaint, as previously noted, was based on the grounds that (1) the District Court lacked jurisdiction and (2) the complaint failed to state a cause of action, both grounds being securely founded upon *United States Navigation*.

If *Montana-Dakota* suggests that exclusive primary jurisdiction in an agency does not denote an absence of such jurisdiction in a court,^{*} it nevertheless leaves undisturbed the rule that the exercise of jurisdiction may involve abuse of discretion in particular circumstances. This proposition is perhaps implied by *United States Navigation*, and is explicitly established in others of this Court's decisions upholding the primary jurisdiction of administrative bodies. *Smith v. Hoboken R. R. Co.* 328 U. S. 123, 129, 133; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 428; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247,

^{*} In *Montana-Dakota*, *supra*, the motion before the Court was one to dismiss the complaint "for want of jurisdiction in that it failed to state a claim under federal law" (341 U. S. at p. 256).

266-267. See also *United States v. Railway Express Agency* (D. C.; Del.), 89 F. Supp. 981; and compare *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. 341.

In the *El Dorado* decision, *supra*, this Court said (308 U. S. at p. 433):

When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. ed. 1472, 33 S. Ct. 916, *supra*, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.

(B) DECISIONS OF THIS COURT PRIOR TO *UNITED STATES NAVIGATION* WOULD HAVE NECESSITATED DISMISSAL OF THE COMPLAINT IN THAT CASE EVEN IF THE SUIT HAD BEEN INSTITUTED BY THE ATTORNEY GENERAL, RATHER THAN BY A PRIVATE PARTY

We have heretofore emphasized that in *United States Navigation*, this Court refused to accept the dictum of the Circuit Court of Appeals to the effect that the Government could have maintained the suit even though a private party could not. In thus declining to follow the Circuit Court of Appeals, this Court was impliedly taking account of its own previous decisions which indicate that the Circuit Court of Appeals had misconceived the law.

The earlier authorities were *United States v. Pacific & Arctic Railway & Navigation Co.*, 228 U. S. 87; *United States v. St. Louis Terminal*, 224 U. S. 383 and 236 U. S. 194; and *Terminal Railroad Assn. of St. Louis v. United States*, 226 U. S. 17. These cases are fully discussed in the brief filed herein by the Far East Conference, and we refer to that discussion in the interest of brevity. It is sufficient to note here that the cases cited show a consistent refusal on the part of this Court, over a period of years antedating *United States Navigation*, to allow the Attorney General to apply the antitrust laws and the criminal provisions of the Interstate Commerce Act in a manner that would have collided with the administrative powers of the Interstate Commerce Commission. Similarly, the same decisions would have stood in the Attorney General's way had he, rather than the United States Navigation Company, filed the complaint which this Court held subject to dismissal in *United States Navigation*.

(C) THE APPLICABILITY OF THE UNITED STATES NAVIGATION DOCTRINE TO A SUIT BY THE ATTORNEY GENERAL HAS NOT BEEN AFFECTED BY SUBSEQUENT DECISION OF THIS COURT

The Attorney General contended below that *United States Alkali Export Assn. v. United States*, 325 U. S. 196, and *United States v. Borden Co.*, 308 U. S. 188, have rendered the rule as to primary administrative jurisdiction inapplicable

to the Attorney General as enforcer of the anti-trust laws. This contention is not supportable.

United States Alkali was a suit by the Government under section 4 of the Sherman Act to restrain violations of that Act by two export associations organized under the Webb-Pomerene Act (15 U. S. C. 61), the domestic members of those associations, a British corporation, and its American subsidiary. The defendants moved for dismissal of the complaint on the ground that its allegations involved matters within the exclusive preliminary jurisdiction of the Federal Trade Commission. The District Court denied the motion and was affirmed by this Court. The affirmance was *not* based upon the ground that the rule of primary exclusive jurisdiction was inapplicable to the Government. Indeed, the opinion contains no suggestion that any such rule exists. Rather, the Court rested its decision upon the following grounds:

(1) The Federal Trade Commission lacked authority to restrain the alleged violations, since it had power only to investigate suspected violations and refer its findings to the Attorney General—in contrast with which the Maritime Board has power to afford a complete remedy under sections 14a and 22 of the Shipping Act (46 U. S. C. 813, 821).

(2) The actions set forth in the *Alkali* complaint were not violations of the Webb-Pomerene

Act, which the Trade Commission administered, but only of the Sherman Act, which the Attorney General had a statutory duty to enforce. In contrast, the present complaint does pertain to matters which fall directly within the purview of the Shipping Act, which the Maritime Board has full power to enforce.

(3) Exclusive jurisdiction in *Alkali* could be lodged in the Trade Commission only if the Webb-Pomerene Act repealed the Sherman Act by implication—which this Court held it did not do. But here, the Shipping Act in section 15 confers an *express* exemption from the antitrust laws, and *United States Navigation* holds that in such circumstances as those here involved, it supersedes those laws.

United States v. Borden Co., supra, involved an indictment under the Sherman Act of several groups of defendants engaged in the production and distribution of milk. The District Court granted a motion to dismiss the indictments on the ground that under the Capper-Volstead Act (7 U. S. C. 291, 292) and the Agricultural Marketing Agreement Act (50 Stat. 246), the acts charged against the defendants were within the exclusive jurisdiction of the Secretary of Agriculture, and were exempt from the Sherman Act. This Court reversed the order of dismissal.

Of the contention that the Agricultural Marketing Agreement Act had superseded the Sherman

Act, this Court said (308 U. S. at 198): "No provision of that purport appears in the Agricultural Act." The Court noted that the Act merely authorized certain milk marketing agreements between producers of milk and the Secretary of Agriculture, and provided that the making of such agreements should not be held to violate the antitrust laws. The Court held that since the Secretary had not been a party to the agreement on which the indictment was founded, the defendants were not within the scope of the granted immunity. Differently stated, the ruling was that the defendants had made themselves parties to an agreement which was not the type of agreement that the statute exempted.

As to the exemption claimed under the Capper-Volstead Act, the Court held that it applied only to *producers* of agricultural products, authorizing certain cooperative action on their part. It said (308 U. S. at p. 204):

In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and noncompetitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is con-

strued by the court below, "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago." 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors, and their allies, to control the market finds no justification in Section one of the Capper-Volstead Act.

The present suit does not charge a conspiracy among any persons other than those covered by the exemption in section 15 of the Shipping Act. In this respect it differs markedly from *Borden*, where the conspiracy included groups of conspirators not protected by any antitrust exemption. The present complaint involves no charge of conspiracy between carriers and shippers, but only a conspiracy among carriers. Since it appears from the complaint that the acts of the defendants were performed under an approved steamship conference agreement (R., 5) and since such agreements are specifically excepted from the antitrust laws, it seems clear that the complaint fails to state a cause of action under those laws. See *Central Transfer Co. v. Terminal R. R. Co.*, 288 U. S. 469, 476.

Borden and *Alkali* both omit any reference to or announcement of a general rule that prior resort to its own administrative agencies is not demanded of the Government—the reason being that no such rule exists.

The Government's case is not helped by *Georgia v. Pennsylvania R. R. Co.*, 324 U. S. 439, in which this Court upheld the right of Georgia to file a complaint charging a conspiracy among defendant railroads to establish a rate structure discriminatory against the State and its inhabitants. The Court held that a proceeding before the Interstate Commerce Commission was not a prerequisite to the filing of a complaint in this Court, since the Interstate Commerce Act does not "legalize a rate-fixing combination of the character alleged to exist here" (324 U. S. at p. 457). It said: (324 U. S. at p. 456)

* * * But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the antitrust laws. It has not placed these combinations under the control and supervision of the Commission * * *

The quoted language clearly indicates the difference between the *Georgia* case and the present action, since under the Interstate Commerce Act, Congress had not, prior to enactment of the Reed-Bulwinkle Act (49 U. S. C. 5b), given the Interstate Commerce Commission authority to exempt rate-fixing combinations from the antitrust laws, whereas under the Shipping Act, Congress has expressly conferred such authority upon the Maritime Board. This distinction is funda-

mental. It seems obvious that *Georgia* would have been differently decided had the Reed-Bulwinkle Act applied to the matters there involved.⁷

(D) THE DISTRICT COURT WAS IN ERROR IN HOLDING THAT THE GOVERNMENT WAS WITHOUT A REMEDY UNDER SECTION 22 OF THE SHIPPING ACT

Resort to an administrative agency will not be compelled when no administrative remedy is available. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246; *McClellan v. Montana-Dakota Utilities Co.* (D. C. Minn., 1951), 95 F. Supp. 977, 979. The Court below therefore held that the United States could not be forced to pursue an administrative remedy under the Shipping Act, for the reason that no such remedy was open to it. The Court reached this conclusion by interpreting Section 22, which confers the right to file a complaint before the Board upon "any person" injured by a violation of the Act, as conferring no such right upon

⁷ Compare *Keogh v. Chicago and N. W. R. Co.*, 260 U. S. 156 (1932) in which this Court held that an action could not be maintained by a shipper under the Sherman Act to recover damages resulting from exaction of unreasonable rates fixed by a conspiracy of the defendant railroads and embodied in tariffs filed with and approved by the Interstate Commerce Commission. That Commission was held to have exclusive power to determine what rates were reasonable; and the Court held that to allow recovery by an individual shipper might disturb the pattern of uniformity that the Interstate Commerce Commission was obligated to enforce in transportation matters.

the United States because the sovereign is not a person. The Court's conclusion is unsound.

While the United States has for some purposes been declared not to be a person, there is no general rule which declares that it is not or cannot be a person. See *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 92-94; *Stanley v. Schwalby*, 147 U. S. 508, 517. Compare *California v. United States*, 320 U. S. 577, 585.

In *United States v. Interstate Commerce Commission*, 337 U. S. 426 (affirming 78 F. Supp. 580) the Government was recognized as a "person" entitled to maintain a complaint proceeding before the Interstate Commerce Commission under section 9 of the Interstate Commerce Act (49 U. S. C. 9) which is patterned closely upon section 22 of the Shipping Act. *United States Navigation Co. v. Cunard, supra*, 284 U. S. at page 481. Further, the Government's status as a person, even under the antitrust laws, is implied by section 16 of the Clayton Act (15 U. S. C. 26) authorizing injunctive relief but providing that "nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States," to sue in equity for such relief against common carriers regulated by the Interstate Commerce Commission.

The Maritime Board has on several occasions authorized intervention by the Attorney General in proceedings before the Board dealing with the dual-rate system. *Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11; *Isbrandtsen Co. v. North Atlantic Continental Freight Conference*, 3 F. M. B. 235. This circumstance was noted, but deemed immaterial, by the District Court. The Board's Rules of Practice (46 C. F. R., sec. 201.81) refer to interveners as "persons." Thus, the Government has been administratively recognized as a person under the Shipping Act; and the administrative practice is entitled to respect in determining whether the Government is within the scope of a statute. *United States v. Cooper Corp.*, 312 U. S. 600, 605.

The District Court, we believe, pursued an unsound judicial policy in denying the Government's status as a person entitled to avail itself of the remedies of the Shipping Act. Its ruling on this point was unnecessary to its decision and might adversely affect the Government in future cases. For example, if the United States is not a person under section 22 of the Shipping Act, it can not, as a shipper, seek reparation from maritime carriers subject to the Board's jurisdiction—although it can seek such reparation before the Interstate Commerce Commission against carriers regulated by that agency. (*United States v. Interstate Commerce Commission*,

supra.) Further, it would appear shortsighted to deny to the Government for all time the right to appear before the Maritime Board in its sovereign, as distinguished from its proprietary, capacity, solely to bolster the Attorney General's position in *this* case.

But whether the Government *in the person of the Attorney General* has an unqualified legal right to file a complaint is of secondary importance. Section 22 of the Shipping Act authorizes proceedings by the Board on its own motion, and the Board hears the Attorney General when he asks to be heard. Its proceedings would be valid even if initiated on a complaint that the complainant had no standing to file. *United States v. N. Y. Central R. R.*, 272 U. S. 457, 462; *Isthmian S. S. Co. v. United States* (S. D. N. Y.), 53 F. 2d 251, 253. Since the Board could and would hear the Attorney General if asked to do so, his preliminary resort to the agency, under the *United States Navigation* doctrine, should not be waived.

While we think it clear that the Attorney General has, both legally and practically, an administrative remedy before the Board, we submit that the present suit would not be maintainable even if he had no such remedy—since the non-availability of a remedy to the Attorney General is in no sense synonymous with the non-availability of a remedy to the United States. The Maritime Board represents the United States and is the United States for the purposes of maritime regulation under the

Shipping Act, to precisely the same extent as the Attorney General represents the United States when acting with respect to matters committed to his jurisdiction. Since the decision in *United States Navigation*, it is undeniable that with respect to such matters as are here involved, the Government acts primarily through the Board and only secondarily through the Attorney General.* Thus, even if the Attorney General has no right to institute Board proceedings, the Board has such a right and the right of the Board is the right of the United States.

(E) THE CONFERENCE AGREEMENT OF THE FAR EAST CONFERENCE
AUTHORIZES THE USE OF THE DUAL-RATE SYSTEM

The Attorney General argued in the District Court that the Far East Conference Agreement did not provide for the dual rate, exclusive patronage system, and that consequently the Board's order approving that agreement could not immunize the Conference, in its use of such system, from the antitrust laws. While this argument seems irrelevant in the light of *United States Navigation*, where the Board was held to have exclusive jurisdiction even though the conference agreement had not been approved (see 50 F. 2d at

* The only duties of the Attorney General under the Shipping Act are those conferred by section 29 (46 U. S. C. 828) which provides that the Attorney General, among others, may apply to a District Court for the enforcement of the Board's orders, other than orders for the payment of money. Even under this provision, the Attorney General has no power to act until after the Board has acted.

p. 85), we nevertheless deem it appropriate to indicate that here, the dual-rate system has in fact been approved.

It is true that the conference agreement of the Far East Conference does not *explicitly* authorize the use of the dual-rate system. It does, however, authorize such rates by necessary inference, and by virtue of the interpretation given to the agreement by the Board and its predecessors over a long period of time.

The conference agreement provides, among other matters, that the conference members may "establish tariffs of freight rates * * *" (R. 11). It does not specify *what* rates or what *kind* of rates (e. g., low or high, single or dual, contract or noncontract) these rates shall be. If it be true (as it is) that the agreement is not expressly permissive of contract and noncontract rates, it is equally true that neither is it expressly permissive of any other type of rates. It seems evident that the type of rate structure to be evolved under the conference agreement was deemed by the parties and the Board to be a matter necessarily subject to development under the Board's supervision, in the exercise of the comprehensive powers conferred upon the Board by the Shipping Act. Any other interpretation would frustrate the Board's powers, and transform the exemption from the antitrust laws into an illusory and perilous "benefit" to the shipping industry—since *any* rate would become a criminal

rate under the Sherman Act unless specifically approved as a part of the conference agreement.⁹ There is no suggestion in the Shipping Act or its legislative history that Congress meant, by the legalization of steamship conferences, to establish any such system of entrapment.

The Board and its predecessors have interpreted the Far East Conference agreement as authorizing the type of rate structure employed by the present defendants. For example, the Shipping Board Bureau in its Docket No. 128, *Section 19 Investigation* (1935) 1 U. S. S. B. 470, specifically referred to the Far East Conference agreement in the following terms (p. 480):

It will be noted that in Tables II and III the rates of the Conference are headed "contract" rates. Prior to the collapse of the Far East Conference in 1931 it has been the practice of the Conference to give on some commodities reduced or "contract" rates to all shippers, large or small, who agreed to give all their business for a period of one year to the Conference carriers. Effective September 1, 1932, as a result of the combined competition of Isbrandtsen-Moller and Ellerman & Bucknall, the Conference revived this contract

⁹ In no field of transportation known to us is a carrier required to obtain advance approval of its rates. Any requirement of that type would obviously impose a regulatory burden upon public agencies that could not conceivably be discharged. See *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 259.

rate system and extended it to practically all commodities. This move by the Conference was countered by substantial additional cuts in rates by Ellerman & Bucknall as indicated in Table II.

Further, the Board and its predecessors, as may be inferred from the complaint (R., 5), have permitted tariffs of dual rates, containing exclusive patronage provisions, to be filed for public information over a period of many years. It cannot be assumed that the filing of such tariffs could have been allowed over a long period of time unless the agency had interpreted the conference agreement as authorizing the tariffs in question. The Board and its predecessors are best qualified to know the scope of their own orders giving approval to the conference agreement, and their interpretation of such orders is entitled to judicial respect. *United States v. Eaton*, 169 U. S. 331, 343; *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, 242; *National Labor Relations Board v. Virginia Electric Power Co.*, 314 U. S. 469, 479; *Byers Transportation Co. v. United States*, (D. C., W. D. Mo.) 48 F. Supp. 550, 553.

The Board approved the Far East Conference Agreement in 1922 (R., 5). As above noted, it knew, officially and actually, that the conference was employing a dual-rate schedule and offering lower rates to shippers signing exclusive patronage contracts. If the Board had interpreted its

order approving the basic conference agreement as *not* authorizing the dual-rate system, it would presumably have entered a further order either enjoining the use of the system, or requiring that the conference agreement be modified under authority of section 15 of the Shipping Act. Since it pursued neither of these alternatives, its conduct emphasizes the Board's understanding that it had authorized the system which the Attorney General here attacks, and this Court should accept the Board's interpretation. As stated in *United States v. Eaton*, *supra* (169 U. S. at 343):

The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness.

In *Bowles v. Seminole Rock and Sand Co.*, 325 U. S. 410, 413, this Court said, relative to a regulation of the Price Administrator:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the

ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

If the Board's order approving the conference agreement does not in fact authorize the exclusive patronage system, it can readily be made to do so by the process of amendment. In these circumstances, it would be no more than an "idle gesture" for a court to enter a decree prohibiting what the Board "might later approve or condone" by amending its own order. *Georgia v. Pennsylvania R. R. Co.*, *supra*, 324 U. S. at 461.

POINT II

THE BOARD HAS POWER UNDER SECTION 14 THIRD AND SECTION 15 OF THE SHIPPING ACT TO APPROVE CONFERENCE AGREEMENTS PROVIDING FOR THE DUAL-RATE SYSTEM

In the court below, the Attorney General contended that even if the Board's order approving the conference agreement should be construed as authorizing the dual-rate system, such approval should nevertheless be disregarded for the reason that the Board lacked statutory power to approve the system. (A similar contention was brushed aside in *United States Navigation*, 284 U. S. at 487.) It may be conceded that no purpose would be served by referring the present controversy to the Board if the Board lacked power to permit the acts with which the conference lines are charged. *Skinner & Eddy Corp. v. United States*,

249 U. S. 557, 562; *Pennsylvania R. R. Co., v. International Coal Mining Co.*, 230 U. S. 184, 197; *Lichten v. Eastern Air Lines* (2d Cir. 1951) 189 F. 2d 939, 946 (dissenting opinion).

We agree with Judge Frank's statement in *Civil Aeronautics Board v. Modern Air Transport* (2d Cir.) 179 F. 2d 622, 625, that to refer a matter to an agency for possible approval of what the law forbids, would be merely a "delaying formalism" that would serve none of the purposes which the doctrine of primary administrative jurisdiction is intended to promote—one of such purposes being to let the courts "make a workable allocation of business between themselves and the agencies." (179 F. 2d at 625.)

Our insistence that the subject of the present suit be referred to the Board before adjudication in court is in no sense based upon the expedient of "delaying formalism," but upon the necessity of protecting the Board's primary jurisdiction as conferred by Congress, to regulate the activities of steamship conferences through the device, among others, of granting or denying them immunity from the normal rules of competitive behavior. Assertion of the Board's primary jurisdiction necessarily rests on the proposition that the Board has power to authorize what the Court is here asked to prohibit.

The Board's power to approve the dual-rate system stems from section 15 of the Shipping Act and involves the question whether the power conferred by section 15 is circumscribed by restrictions set forth in section 14, paragraph Third, of the same statute.

The Board's power to authorize the use of dual rates is the principal question presented in *Federal Maritime Board v. United States of America, et al.*, No. 135 on this Court's current docket, and in its companion appeal, *A/S J. Ludwig Mowinckels Rederi, et al. v. Isbrandtsen Co., Inc.*, No. 134 on the current docket. The Maritime Board in No. 135 has briefed in detail the arguments in support of its authority to approve the dual-rate system. We refer to the Board's brief in that case in support of its contention here that approval of the dual-rate system for use by conferences in the foreign commerce of the United States is within the Board's statutory authority.

CONCLUSION

This case aptly illustrates the need "to make a workable allocation of business" between the District Court, on the one hand, and the Board, on the other, in relation to their respective duties under the interacting provisions of the antitrust laws and the Shipping Act. It calls for application of the rule of *United States v. Morgan*, 313 U. S. 409, 422, that courts and administrative agencies "are to be deemed collaborative instrumentalities of justice and the appropriate inde-

pendence of each should be respected by the other." The court should recognize here, as it recognized at an earlier stage of the *Morgan* litigation (307 U. S. 183, 191), that—

* * * court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.¹⁰

¹⁰ See also *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, *supra*, 341 U. S. at 263-264 (dissenting opinion). And compare *West India Fruit & S. S. Co. v. Seatrain Lines, Inc.*, (2d Cir., 1948), 170 F. 2d 775, petition for certiorari dismissed, 336 U. S. 908, where the Court, in aid of the Maritime Commission's jurisdiction, issued an injunction which the Commission could not have issued, so that the Commission, in the exercise of its primary jurisdiction, could inquire into the lawfulness of a threatened rate war in foreign trade.

The present suit, like many other cases involving collaborative action among the members of a regulated industry, emphasizes the potential conflict between the antitrust laws and a regulatory statute, and presents a challenge to devise a formula for the avoidance of such conflict. The facts set forth in the complaint relate to activities which might be violations of the antitrust laws, but which also are squarely within the purview of the Shipping Act. The antitrust laws embody an economic policy looking toward the maintenance of unrestricted competition as the basic *general* rule for the conduct of the nation's business. The Shipping Act points in a different direction, and prescribes for the shipping industry, by way of specific and purposeful exception to the general policy of the antitrust laws, a system of controlled competition which, but for the Shipping Act, we may assume the antitrust laws would prohibit. We assume that the Attorney General, in his administrative capacity as the Government's chief legal officer, is bound to take account of the Shipping Act as ungrudgingly as he enforces the Sherman Act. The rule of *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, 47, where this court said:

* * * It is sufficient for this case to observe that the Board has not been com-

5
missioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

is justly applicable to the Attorney General in the present suit.

Congress could not have meant that the shipping industry should be the victim of competition between government agencies or officers respectively charged with the administration of statutes which subject persons affected by them to inconsistent legislative standards. It seems clear that this was the consideration that controlled the reasoning of the court in *United States Navigation*, and which prompted the Court in that decision to establish the regulatory pattern that recognized the Shipping Act rather than the antitrust laws as the first commandment for maritime carriers in foreign trade.

We submit that every consideration of regulatory and economic policy which prompted this Court to apply the rule of exclusive primary jurisdiction in favor of the Board in *United*

States Navigation, should impel the Court to apply it similarly here. In so doing, the Court would give recognition to the fact that the courts and the Maritime Board are "collaborative instrumentalities of justice," and would enable each to function effectively in its own province.

Dismissal of the present complaint would not mean that the shipping industry was fully discharged from the restraints of the antitrust laws. It would mean that the Board, with the cooperation of the Attorney General if he chooses to lend it, could discharge its officially delegated powers in the manner intended by Congress; and it would preserve to the courts their power to assure the Board's compliance with law through the exercise of their powers to review the Board's action (Shipping Act, section 31, 46 U. S. C. 830). The Board's position would have no tendency whatever to nullify the jurisdiction of the courts, since the Board does not contend that it has power to speak the last word, but only the first, with respect to the legality of the acts charged against the defendants by the present complaint.

WE REQUEST THAT THE ORDER OF THE DISTRICT COURT, INsofar AS IT DENIED THE MOTIONS TO DISMISS THE COMPLAINT, BE REVERSED; OR IN THE ALTERNATIVE, THAT THE CASE BE REMANDED TO THE DISTRICT COURT WITH DIRECTIONS TO STAY FURTHER PROCEEDINGS PENDING REFERENCE OF THE COMPLAINT TO THE BOARD.

Respectfully submitted.

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APPENDIX A

SHERMAN ACT

SECTION 1. (15 U. S. C. 1, 26 Stat. 209). Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

SEC. 2. (15 U. S. C. 2, 26 Stat. 209). Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. (15 U. S. C. 4, 26 Stat. 209, 36 Stat. 1167). The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall pro-

ceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SHIPPING ACT

SEC. 14. (46 U. S. C. 812, 39 Stat. 733). That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay, or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purposes of excluding, preventing, or reduc-

ing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provisions of this section shall be guilty of a misdemeanor punishable by a fine of no more than \$25,000 for each offense.

SEC. 15. (46 U. S. C. 814, 29 Stat. 733). That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations,

or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in

part, directly or indirectly, and such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SEC. 22. (46 U. S. C. 821, 49 Stat. 736). That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two

years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

**FAR EAST CONFERENCE, UNITED STATES LINES
COMPANY, STATES MARINE CORPORATION, ET AL.,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES DIS-
TRICT COURT FOR THE DISTRICT OF NEW JERSEY**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 15 Misc.

**FAR EAST CONFERENCE, UNITED STATES LINES
COMPANY, STATES MARINE CORPORATION, ET AL.,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES DIS-
TRICT COURT FOR THE DISTRICT OF NEW JERSEY**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 97) is reported at 94 F. Supp. 900.

JURISDICTION

The order of the district court denying the motions to dismiss the complaint was entered on March 7, 1951 (R. 104-5). The motion for leave to file a petition for writ of certiorari was filed on June 2,

1951, and the motion and petition were granted on October 8, 1951 (R. 105). Jurisdiction of this Court is conferred by 28 U.S.C. 1651 (a).

QUESTION PRESENTED

A conference of shipping lines and its members have been charged in a civil action by the United States under the Sherman Act with engaging in a combination and conspiracy to coerce shippers to patronize conference members exclusively by exacting from shippers who do not enter exclusive dealing contracts with conference members a discriminatively higher rate than is charged those who enter such contracts. Motions to dismiss the action on the ground that the subject matter of the suit is exclusively within the jurisdiction of the Maritime Board were denied.

The question presented is whether the Shipping Act, 1916, as amended, deprives the district court of jurisdiction of this action.

STATUTES INVOLVED

The pertinent sections of the Sherman Act, the Clayton Act and the Shipping Act, 1916, as amended, are set forth in the Appendix, *infra*, pp. 44-47.

STATEMENT

Petitioners seek reversal of an order of the district court denying motions to dismiss a civil complaint against them by the United States charging violations of Sections 1 and 2 of the Sherman Act.

The principal charge of the complaint (par. 32, R. 5-6) is that petitioners have engaged in:

a continuing agreement and concert of action * * * to control the transportation of all cargo in the outbound Far East trade by establishing and maintaining a system of "contract rates" and higher "non-contract rates," the sole consideration for the enjoyment of the lower "contract rates" being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the outbound Far East trade.

Cancellation of the exclusive dealing contracts, and injunctive relief to prevent resumption of the activities alleged to be unlawful, are sought by the complaint (R. 7-8).

The facts

This case arises on the complaint. The facts, as disclosed by the complaint and attached exhibits, are as follows:

The corporate petitioners are common carriers by water engaged in the transportation of property in what is known as the "outbound Far East Trade."¹ They are associated as members of petitioner Far East Conference, which operates under a Conference Agreement approved in 1922 by the United States Shipping Board (a predecessor of

¹ The term includes transportation from Atlantic Coast and Gulf ports to ports of Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China and the Philippine Islands.

the Federal Maritime Board)² under the provisions of Section 15 of the Shipping Act, 1916, 39 Stat. 733, 734, 46 U.S.C. 814. The membership of petitioner Conference includes all but one of the common carrier shipping lines regularly engaged in the transportation of property in the outbound Far East trade. (Compl., par. 29, R. 4-5.)

The Conference Agreement (Ex. A to Compl., R. 8-16)³ states as its purpose "to promote commerce" "for the common good of shippers and carriers, by providing just and economical co-operation between the steamship lines" involved (Preamble, R. 8). The Agreement provides, *inter alia*, for the adoption by the Conference of, and adherence by the members to, a tariff of rates and charges (pars. 1, 8, 9, R. 8, 10, 11). Liquidated damages are provided for breach of the Agreement (par. 11, R. 12). Members may be expelled for cause, and new members may be admitted to the Conference with the consent of a majority of the present members (pars. 21, 24, R. 14-15, 16).

The Conference Agreement provides that there "shall be no unjust discrimination against, and no rebates of freight or compensation shall be paid to, any shipper" by any member of the Conference (par. 2, R. 9). There is no provision in the Agreement requiring, or in terms providing, either that

² The Federal Maritime Board and its predecessors are hereinafter referred to as "the Board".

³ The Agreement has been amended from time to time, and is set forth in its amended form in the record.

there shall be exclusive dealing arrangements between Conference members and shippers, or that there shall be a dual system of rates conferring a rate advantage upon shippers who enter such arrangements. Petitioners, however, have established the so-called "contract" and "non-contract" rate system for the purpose of driving out of, and excluding from participation in the outbound Far East trade, steamship lines not parties to the combination and conspiracy, and thereby achieving and maintaining a monopoly of the transportation of cargo in such trade (Compl., par. 34, R. 6).

The combined economic power of petitioners, exerted through the above-described rate differentials, has been used to induce and compel shippers in the outbound Far East trade to enter into exclusive dealing arrangements with the shipping line petitioners (Compl., par. 33, R. 6).⁴ Petitioners have enforced the exclusive dealing obligations by threatening withdrawal of the so-called "contract rates" and the imposition of oppressive fines and penalties for any deviation by shippers from the terms of the agreements (*ibid.*). The following penalty provision is embodied in the exclusive dealing contract (Ex. B, par. 4, R. 18):

If the Shipper shall make any shipments in violation hereof, this agreement shall immedi-

⁴ The exclusive dealing contract (Ex. B to Compl., R. 16-21) requires the shipper, in consideration of the rates specified, to forward all of his shipments in the outbound Far East trade by vessels of Conference members if such members have space available.

ately become null and void as to future shipments, and thereupon the Shipper shall be liable to the transporting carriers for payment of additional freight on all commodities theretofore shipped with such carriers for a period not exceeding twelve months immediately preceding the date of such shipment, at the non-contract rate or rates on all commodities set forth in the current tariffs of the transporting carriers in force at the time of such shipments.

The exclusive patronage contracts, and the threat of oppressive fines for deviation therefrom have, as intended by petitioners, prevented other shipping lines from competing with the petitioners in the outbound Far East trade (Compl., par. 36, R. 6-7).

The proceedings below

The complaint was filed in the district court on August 6, 1948. Petitioners filed answers (R. 21, 46) admitting concerted use by them of the dual rate system and the exclusive dealing contract, but asserting, *inter alia*, that this practice was in conformity with the Conference Agreement, and that the approval of that Agreement by the Shipping Board exempted all of the acts of the petitioners alleged in the complaint from the provisions of the Sherman Act.⁵ The answers also assert that the practices involved are reasonable.

⁵ Ans., pars. forty-eighth (b), R. 37; Ans., par. forty-ninth (b), R. 62. Supplemental answers were filed at a later time (R. 76, 85, 95).

Petitioners filed motions to dismiss the complaint on the ground, *inter alia*, that the court had no jurisdiction of the subject matter. It was contended that the allegations of the complaint constitute charges of violation of the Shipping Act, 1916, as amended, that the latter statute supersedes the antitrust laws in this area, and that the charges in the complaint fall initially within the exclusive jurisdiction of the Maritime Board (R. 72, 74). The Maritime Board, which had intervened as a defendant (R. 94, 98), also filed a motion to dismiss, which likewise asserted that the district court lacks jurisdiction of the subject matter of the action (R. 95). The Government filed a motion for judgment on the pleadings (R. 93).

The district court (Smith, J.), after hearing oral argument and considering briefs, denied the motions to dismiss (R. 104-5).⁶ It rejected any suggestion that "the mere fact that the shipping industry is subject to governmental regulation" serves to exempt those engaged in it from the Sherman Act, and held that "the only exemption is that which is granted by a specific provision of the Shipping Act" (R. 99). The district court noted that Section 15, the section authorizing the Maritime Board to confer exemption by approving agreements is not unlimited, and, further, that "the

⁶ The Government's motion for judgment on the pleadings was also denied (R. 104-5), but that ruling is not in issue here since the Government did not cross petition for a writ of certiorari to review it.

Conference Agreement, having been approved by the Shipping Board, may be within the purview of the statutory exemption, but it does not follow that *all conduct of the defendants * * * are exempt*" (*ibid.*; italics supplied).

The district court also rejected the argument that exemptions from the antitrust laws created by the Shipping Act, whatever may be their precise scope, operate as a *pro tanto* repeal of the jurisdictional provisions of the Sherman Act. While the court fully recognized that petitioners might interpose the claimed exemption as a substantive defense in the Sherman Act proceeding, it ruled that the exemption "may not be raised as a procedural bar to the right of the United States to prosecute this action" (R. 101).

SUMMARY OF ARGUMENT

I

A. No provision of the Shipping Act exempts the conduct here alleged. The express exemption provision of Section 15 is in terms applicable only to agreements which the Board finds are not unjustly discriminatory or unfair, do not operate to the detriment of the commerce of the United States, and are not in violation of the Shipping Act. There is no showing that the agreement here alleged was ever filed with or approved by the Board. The Conference Agreement, which provides generally for adoption of tariffs by joint action of the Conference members, was filed and approved, but if

that approval be construed as advance sanction of any and all subsequent conference rate agreements, it would be an unlawful abdication of the explicit duty of the Board to pass affirmatively upon all carrier agreements.

B. Whether or not the agreement to use the contract/non-contract rate system has been filed and approved, the system is unlawful because it constitutes a retaliatory, discriminating and unfair device for penalizing shippers who refuse to agree to patronize Conference members exclusively. It is therefore violative of Section 14 Third of the Shipping Act; and cannot lawfully be approved by the Board under Section 15. In this connection, the argument in the Government's brief in Nos. 134 and 135 is adopted here by reference.

II

A. The express exemption in Section 15 of the Shipping Act should not be enlarged by implication. Implied repeals are not favored, and the standards for such repeals are not met here. The Shipping Act fails to manifest any clear congressional intent to supersede the Sherman Act, except to the extent provided in Section 15. There is no inconsistency between the two statutes. *United States v. Borden Co.*, 308 U.S. 188.

B. Petitioners' reliance upon *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, and similar cases under the Interstate Commerce Act is misplaced. That decision precludes

the use of *private* antitrust remedies as to matters within the purview of the Shipping Act, but does not purport to restrict the right of the Attorney General to institute actions to enforce the antitrust laws. Such a right has been uniformly recognized by this Court in a long series of cases before and since the *United States Navigation* case. E.g. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290; *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U.S. 500, 513.

C. There is no support in the legislative history of the Shipping Act for the contention that Congress meant to create a greater exemption from the antitrust laws than that which it expressly provided in Section 15.

ARGUMENT

Introduction

In our view, this case involves the single question whether a civil action by the United States under the Sherman Act is barred because the alleged conduct which forms the basis of the complaint is violative also of the Shipping Act, and because the defendants named in the complaint are persons subject to that Act.

It is somewhat misleading to consider the problem as petitioners do in terms of the primary original jurisdiction of an administrative agency to pass upon questions arising under the statute it administers. Plainly, the Federal Maritime Board does not administer the antitrust laws, nor is it empowered to adjudicate questions arising under

them. As the court below held, "The mere fact that the shipping industry is subject to governmental regulation does not wholly exempt those engaged in it from the provisions of the Sherman Act" (R. 99). The primary original jurisdiction of the Board comes into play only if it is concluded that the antitrust laws have in fact been superseded in the area involved. In other words, the real issue is whether the district court erred in this case in holding that the Sherman Act has not been expressly or impliedly repealed, *pro tanto*, by the Shipping Act.

If, as the Government contends, the conduct here involved is prohibited by the Sherman Act, and nothing in the Shipping Act either legalizes such conduct or permits the Board to legalize it, then there is no connection between any possible Board action and the question whether the anti-trust laws have been violated.

The reliance by all parties here on the early case of *United States v. Pacific & Arctic Co.*, 228 U.S. 87, illustrates the confusion which arises from failure to differentiate between the two concepts—repeal and primary jurisdiction. Petitioners point to *Pacific & Arctic* for its holding that offenses under the Interstate Commerce Act must first be considered by the Interstate Commerce Commission. The Government relies on the same case for its holding that offenses under the Sherman Act are triable by the district court in the ordinary manner even though they arise in the transportation field.

Petitioners seek to distinguish this latter holding (Other Pet. Br.⁷ 32-34) on the ground that the Sherman Act was applicable only because the Interstate Commerce Act did not cover the conduct involved. Although we do not think that the opinion of this Court in *Pacific & Arctic* supports that theory, our point here is simply that in any event it would not be enough to show that some other statute covers the conduct in question; it must also be shown that the Sherman Act has been *pro tanto* repealed. If it has not, then there is no occasion to apply the primary jurisdiction rule.

We propose to show that the express exemption from the antitrust laws contained in the Shipping Act is limited in character and does not cover the conduct alleged in this complaint. And we propose to show further that there is no basis in principle, precedent, or the legislative history of the Shipping Act for the conclusion that, as applied to suits by the United States, this limited express exemption should be enlarged by implication to cover all matters cognizable under the Shipping Act.

I

Petitioners' conduct has not been exempted from the Sherman Act by any provision of the Shipping Act

Section 15 of the Shipping Act (*infra*, pp. 45-46) generally requires the filing with the Board of carrier agreements affecting rates, shipping practices

⁷ Abbreviation for "Brief of Petitioners other than Isthmian Steamship Company."

and competition. All such agreements (unless in existence when the Act was passed) are expressly made "lawful only when and as long as approved by the board". And the Board's power to approve agreements is by no means unlimited. Only those agreements which (1) are not "unjustly discriminatory or unfair as between carriers, shippers [etc.]", (2) do not "operate to the detriment of the commerce of the United States," and (3) are not "in violation of this Act," may be approved. Thus an agreement does not acquire validity under Section 15 merely because it is of the type which is required to be filed thereunder, or because in fact it has been filed. It becomes lawful only when approved by the Board, acting within the powers in terms conferred by the Section. To illustrate, an agreement providing for deferred rebates is an agreement "giving. * * * special rates" and "preventing, or destroying competition." Hence, it would have to be filed under Section 15 (*infra*, p. 45). But the requirement that the agreement be filed, or the actual filing of such an agreement, would not make it lawful. Only lawful Board approval could validate the agreement, and the Board could not lawfully approve the use of deferred rebates. Section 14 First.

The exemption provision of Section 15 is explicit:

Every agreement, modification, or cancellation *lawful* under this section shall be excepted from * * * [the antitrust laws].
[Italics added.]

As a matter of statutory construction, it seems beyond debate that the qualification introduced by the word "lawful" precludes treating the exemption as unlimited. The provision can hardly be read as if it said "Every agreement * * * within the purview of this section shall be exempted", or "Every agreement * * * lawful or unlawful under this section shall be exempted". Yet petitioners are forced to urge such a perversion of explicit language if they are to rely upon this provision to exculpate their conduct from the Sherman Act. On the facts alleged in the complaint, and admitted by the motions to dismiss, petitioners' conduct is clearly not lawful under Section 15. First, the rate agreements embodying the contract/non-contract rate system are not shown to have been filed with or approved by the Board. Second, the Board is without power in any event to approve the system because it involves retaliation against shippers and use of discriminating and unfair methods in direct violation of Section 14 Third of the Shipping Act.

A. The conference agreements, if any, permitting the use of the contract/non-contract rate system, have not been filed with and approved by the Board.

The complaint charges (par. 32, R. 5-6) that petitioners have engaged in "a continuing agreement" to

control the transportation of all cargo in the outbound Far East trade by establishing and

maintaining a system of "contract rates" and higher "non-contract rates," the sole consideration for the enjoyment of the lower "contract rates" being the agreement of the shipper to patronize members of the Far East Conference exclusively in effecting the shipper's transportation requirements in the out-bound Far East trade.

The complaint does not show that this agreement was filed with or approved by the Board.^{*} The only agreement referred to in the complaint as having been so filed and approved is Conference Agreement No. 17 (par. 29, R. 5), a copy of which (as amended to December 4, 1947) is attached to the complaint (Ex. A, R. 8). That agreement may be searched in vain for any direct reference to the contract/non-contract rate system. Petitioners rely, however, upon paragraphs 1, 8, and 9 of this agreement as sanctioning the dual rate system,

^{*} Petitioners place some reliance (Isthmian Br. 29-30, Other Pet. Br. 42-44) upon the discussion of the Board in *Investigation—Section 19 of Merchant Marine Act, 1920*, 1 U.S.S.B.B. 470, 480 (1935) as establishing the recognition and approval of the use by petitioner Far East Conference of contract/non-contract rates, but neither formal nor informal approval is conveyed by the quoted language. The principal concern of the investigation appears to have been undue rate cutting (*id.* at 501); the order which emerged required that tariffs in the future be filed with the Board (*id.* at 502-3). It does not appear that the limited use of the contract/non-contract rate system described was challenged or was in any way at issue. And even if it be assumed, *arguendo*, that this casual reference to use of the dual rate system constitutes the kind of approval contemplated by Section 15, there is no showing that the agreements alleged by the complaint are the same as those discussed in the above Board decision.

since that system involves the fixing of rates (Isthmian Br. 29; Other Pet. Br. 39-41). These paragraphs are as follows (R. 8, 10-11):

1. All freight or other charges for the transportation of cargo between the aforementioned ports shall be charged and collected by the parties hereto, strictly in accordance with the tariff of rates and charges agreed to by the parties.

8. The parties hereto shall consider and pass upon any matter involving discriminations, tariffs, freights, brokerages, or other charges, or the regulation of transportation between the aforementioned ports at any meeting of the Conference, provided that notice in writing, descriptive of the matter to be considered, has been given each party hereto by the Secretary, at the direction of the Chairman, at not later than 4 P. M. of the day prior to the date of meeting; and the Chairman shall cause such notice to be given on the request of any party hereto made in writing to the Chairman not later than 11:00 A.M. of the day prior to the date of meeting. If all of the parties hereto are present at any meeting, action may be taken on any matter within the scope of this agreement without prior notice thereof. Any matter or thing brought before the meeting in the manner aforesaid and agreed to by a majority of the parties hereto, shall thereby become an agreement binding upon all

of the parties hereto, with the same force and effect as if expressly made a part of this agreement.

9. Pursuant to recommendations made by the Chairman, or pursuant to the recommendation of any Committee or Sub-Committee authorized by a majority vote of the parties hereto, and appointed as provided in Article 7 hereof, or without any recommendation, the parties shall establish tariffs of freight rates, charges, brokerages, transportation regulations and/or any other matter within the scope of the agreement by the affirmative vote of the majority of their number, at any meeting held in accordance with the provisions of Article 8 hereof, and all of the parties hereto agree that they will be bound by the affirmative vote of the majority of their number upon the matters aforesaid with the same force and effect as if expressly made a part hereof.

The above language confers authority in the broadest of terms upon the Conference to adopt rate agreements. There are no limitations as to the lawfulness, character, or reasonableness of any of the prospective agreements.⁹ Petitioners contend, however, that approval of a basic conference agreement carries with it advance endorsement of any and every rate agreement which the conference may thereafter adopt (Isthmian Br. 29-31; Other Pet. Br. 40-43). That would indeed be dele-

⁹ Another provision (par. 2, R. 9) prohibits individual members (not the Conference) from any "unjust discrimination against" any shipper.

gation run riot of public authority to private parties. It would mean that the Board had authorized a combination which "is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of" foreign commerce. *Fashion Originators' Guild, Inc. v. Federal Trade Commission*, 312 U.S. 457, 465.

The language of Section 15 of the Shipping Act, making carrier agreements unlawful unless and until explicitly approved by the Board, hardly lends itself to the notion that all future conference agreements can be endorsed in advance in blank with the Board's imprimatur. Petitioners have not succeeded in showing how the Board could find in advance that any agreement which might thereafter be reached by a particular group of shipping lines¹⁰ would not be unjustly discriminatory, or detrimental to the commerce of the United States, or in violation of the Shipping Act. Yet, these specific findings are a prerequisite to Board approval

¹⁰ The extreme character of the purported delegation is aggravated by the fact that the composition of this private group is by no means a stable or permanent one. The membership of the Conference is subject to change on short notice and without Board approval (Ex. A to Compl., par. 22, R. 15; par. 24, R. 16). The Conference is empowered to act by majority vote (Ex. A, Compl., par. 9, R. 11). The majority of the Conference to which these powers are assertedly delegated may at any particular time be composed of foreign corporations. That this is the present situation is indicated by the list of shipping lines named defendants in this complaint. Of the 25 lines named, only 6 are American corporations (R. 2-4). It is unlikely that Congress intended to make it possible to delegate to a group controlled by foreign corporations the function of deciding whether particular agreements are detrimental to the commerce of the United States.

of any agreement under Section 15. Petitioners would substitute, in place of such findings, a general anticipatory hope and guess on the part of the Board that none of these particular evils will come to pass.

The legislative history of the Shipping Act, which is heavily relied upon by petitioners to establish the importance of leaving to the Board the administration of matters affecting the shipping industry (Isthmian Br. 34-42; Other Pet. Br. 72-87), is also irreconcilable with the concept of abdication of that function here urged. The Alexander Report (H. Doc. 805, 63rd Cong., 2nd Sess., 417-8) states:

While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of *effective government supervision*. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service. [Italics added.]

Petitioners may argue that the delegation by the Board implicit in the construction they urge is not irrevocable, because any agreement reached by a

conference may be disapproved by the Board at any time, even though once approved. This is perfectly true, but it is equally true that such a procedure is not the one which Congress saw fit to require. To treat every agreement as legal until disapproved would do violence to the express statutory provision to the contrary. It is untenable to contend that a public regulatory body could discharge an explicit duty to pass affirmatively upon every oral or written rate agreement including "understandings, conferences, and other arrangements", by approving a basic conference agreement delegating limitless power to a majority of shipping lines within the conference, subject only to the agency's reserved right of disapproval. Nor can it be successfully maintained that Board approval of the dual rate system is so well settled that to present each individual agreement to it for approval would be a futile act. Not only has the Board approved the use of the system in some circumstances and disapproved it in others,¹¹ but in the decision in *Isbrandtsen Company, Inc. v. North Atlantic Continental Freight Conference*, 3 F.M.B. 235 (1950), now before this Court for review (Nos.

¹¹ Compare *Eden Mining Co. v. Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922); *Intercoastal Investigation*, 1 U.S.S.B.B. 400 (1935); *Contract Routing Restrictions*, 2 U.S.M.C. 220 (1939); and *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524, approved, *Swayne & Hoyt, Ltd. v. United States*, 18 F. Supp. 25 (D. D.C.), affirmed, 300 U.S. 297, with *Rawleigh v. Stoomvaart*, 1 U.S.S.B. 285 (1933); and *Pacific Coast European Conference*, 3 U.S.M.C. 11.

134, 135; see *infra*, p. 22), the Board said (3 F.M.B. at 241):

"The practice of our predecessors has been to examine the details of each dual rate system which has been presented, and determine whether there was violation of any express prohibition of the Act, or whether any features were unreasonable or unjustly discriminatory. In a number of the reported decisions of our predecessors, dual rate systems have been disapproved on the latter ground.

Although we differ with the Board's conclusion as to its power to approve the dual rate system at all (see *infra*, p. 22), we think it clear that if that power be assumed, the Board's *ad hoc* treatment of each case upon its own facts completely refutes any suggestion that Board approval is so automatic as to be regarded as a formality.

The practical consequences of petitioners' interpretation are equally serious. Section 15 draws no distinction between the kinds of agreements which must be filed, and the kinds which must have Board approval to be legal. Hence, if the Board's approval of a basic conference agreement carries with it Board approval of every subsequent agreement reached by the Conference, then it would follow that none of these subsequent agreements need be filed with the Board. Thus the entire system of secret conference agreements and oppressive conference practices which led to the enactment of the

Shipping Act¹² would be permitted to flourish with the tacit blessing of the administrative agency which Congress created to regulate the industry.

The point is so clear that it need not be labored further. We submit that the filing of a general conference agreement which provides for further specific agreements is not a substitute for the filing of such further agreements, and the approval by the Board of a basic conference agreement does not constitute approval of all subsequent agreements made thereunder.

B. The Board is not empowered to approve the contract/non-contract rate system.

In *Rederi, et al. v. Isbrandtsen Co., Inc., et al.*, No. 134, and *Federal Maritime Board v. United States, et al.*, No. 135, the power of the Board under Section 15 to approve the contract/non-contract rate system is the central issue presented for decision. The order of the Board under review in that case explicitly approves the use of the system in the circumstances there presented. For the reasons stated in the Government's brief in those cases, we believe that the following is clear: (1) Higher "non-contract" rates levied against shippers who refuse to enter exclusive dealing contracts with a conference constitute retaliation against shippers and resort to discriminating and unfair methods. (2) Such methods are directly

¹² H. Doc. 805, 63rd Cong., 2nd Sess., 304, 307, 311-3, 417-8.

violative of Section 14 Third of the Shipping Act which makes it unlawful for any common carrier by water to

Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason:

(3) Since the Board is forbidden by the express language of Section 15 to approve agreements "in violation of this Act", it obviously cannot approve agreements in violation of Section 14 Third of the Act.

The argument in the Government's brief in Nos. 134 and 135 is hereby adopted and made a part of this brief.

II.

Petitioners' conduct is not exempted from the Sherman Act by implication

In point I it was demonstrated, that the narrowly drawn exemption from the Sherman Act contained in Section 15 of the Shipping Act does not exculpate the alleged actions of petitioners which stand admitted here. We think it equally clear that there has been no *pro tanto* repeal of the antitrust laws by implication.

A. This Court has repeatedly rejected contentions that Government antitrust remedies have been superseded by implication.

Petitioners cite many cases in support of the settled doctrine that an administrative agency has exclusive primary jurisdiction to pass upon most of the questions arising under the statute *which it administers*. The question here, however, is not whether the Board has exclusive original jurisdiction of a proceeding under the Shipping Act, but whether a cause of action under the antitrust laws is barred by the Shipping Act. In other words, the problem here is whether the antitrust laws have been repealed by implication with respect to all conduct which may come within the purview of the Shipping Act.

None of the decisions in this Court cited by petitioners stands for the proposition that an action by the United States under the Sherman Act is barred by the existence of some other regulatory statute dealing with the area of activity involved. An unbroken line of decisions is to the contrary.¹³

¹³ *United States v. Trans-Missouri Freight Association*, 166 U.S. 290; *United States v. Joint Traffic Association*, 171 U.S. 505; *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383; *United States v. Pacific & Arctic Co.*, 228 U.S. 87; *United States v. Borden Co.*, 308 U.S. 188; *United States Alkali Assn., Inc. v. United States*, 325 U.S. 196; and see, *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 161-2; *Central Transfer Co. v. Terminal Railroad Assn.*, 288 U.S. 469, 474-5; *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U.S. 500, 513; *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 452-3, 456-7, and see dissenting opinion, p. 474; and *United States Navigation Co. v. Cunard Steamship Co.*, 50 F. 2d 83, 85-6, 88, 89 (C.A. 2), affirmed, 284 U.S. 474.

In a variety of situations this Court has rejected contentions that the antitrust laws have been repealed or superseded by implication.

The early case of *United States v. Pacific & Arctic Co.*, 228 U.S. 87, is an apt illustration that the doctrine of prior administrative determination, applicable to judicial proceedings based upon obligations imposed by a regulatory statute such as the Interstate Commerce Act, does not apply to a suit by the Government to enforce the Sherman Act. In that case the district court had dismissed an indictment containing two counts charging violation of the Sherman Act and three Counts charging violation of the Interstate Commerce Act, upon the theory that the acts charged against the defendants concerned discrimination in rates and through billing which the Interstate Commerce Act committed to the Interstate Commerce Commission for initial determination. This Court upheld the decision as to the Interstate Commerce Act counts but reversed as to the Sherman Act counts. The Court held that since the latter counts set forth a combination prohibited by the Sherman Act, the power of the Interstate Commerce Commission over the rates and through-traffic arrangements adopted by the defendants was irrelevant (228 U.S. at 104-5).

In *United States v. Borden Co.*, 308 U.S. 188, the district court had dismissed certain counts of an indictment under the Sherman Act upon the

ground that the Agricultural Marketing Agreement Act, 50 Stat. 246, 7 U.S.C. 671 *et seq.*, had vested in the Secretary of Agriculture plenary power over the marketing of milk, and that as a result such marketing "is removed from the purview of the Sherman Act" (308 U.S. at 197). This Court reversed unanimously. The Court pointed out that there was no express provision creating such an unqualified exemption in the Agricultural Marketing Agreement Act, and reaffirmed the "cardinal principle of construction that repeals by implication are not favored" (p. 198). The following language (per Chief Justice Hughes) is particularly pertinent here (pp. 198-9):

When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States v. Tynen*, 11 Wall. 88, 92; *Henderson's Tobacco*, 11 Wall. 652, 657; *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 61, 62. The intention of the legislature to repeal "must be clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by

implication only *pro tanto* to the extent of the repugnancy." See, also, *Posados v. National City Bank*, 296 U.S. 497, 504.

In the *Borden* case, as here, the statute relied upon as superseding the Sherman Act in a particular area of economic activity contained express provisions prescribing the scope of antitrust exemption. Of these provisions this Court said (p. 201):

These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so.

Petitioners point out that the *Borden* case may be distinguished on its facts from the case at bar, and that the statute involved in that case is less comprehensive in its regulatory scheme than the Shipping Act (Isthmian Br. 24-5; Other Pet. Br. 101-4). But the standards there established for judging repeals by implication are applicable generally. If they are given effect here, it is clear that there can be no repeal by implication. In the language of Mr. Justice Story (quoted approvingly in the *Borden* case, *supra*), it would not be sufficient for petitioners "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirma-

tive, or cumulative, or auxiliary." In the present case the subsequent law does not purport to cover all the matters covered by the Sherman Act. Thus, for example, there is nothing in the Shipping Act comparable to the monopoly provisions of Section 2 of the Sherman Act. A single carrier which set out to achieve a monopoly by buying up competitors would violate no provision of the former Act.

The *Borden* case holds that before repeal of a statute by a later one will be inferred, there must be a "clear and manifest intention" by Congress to repeal, and a "positive repugnancy" between the old and new statutes. There is no clear and manifest intention by Congress to confer an unlimited exemption here; indeed, the inclusion of the limited exemption provision indicates a contrary intention. (And see discussion of legislative history, Section C, *infra*.)

Finally, there is no "positive repugnancy" between the two statutes. The court below has pointed out that Section 15, the only provision of the Shipping Act which affirmatively authorizes the Board to permit activity violative of the antitrust laws, contains an express exemption "coterminous with this limited authority" (R. 100). Thus if we should be in error in our contention that Section 14 Third precludes Board approval of the contract/non-contract rate system (point I B, *supra*), and if it should be established at the trial of this case that the agreements to utilize the contract/non-contract rate system had been filed with and lawfully ap-

proved by the Board, petitioners would have a complete defense to this action. This fact is clearly recognized by the decision of the court below (R. 100-1). Conversely, if our contentions are correct, an injunction under the antitrust laws against the conduct here involved would in no way interfere with the administration of the Shipping Act.¹⁴

In *United States Alkali Assn., Inc. v. United States*, 325 U.S. 196, this Court considered a statutory scheme which came closer to justifying the conclusion that there was congressional intention to repeal the Sherman Act *pro tanto* than does the present case. The Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61 *et seq.*, explicitly exempts certain activities of export associations from the Sherman Act. Section 5 of the Webb-Pomerene Act confers upon the Federal Trade Commission the duty to investigate activities of such an association which go beyond the scope of the exemption. The Commission has the power to make recommendations to the association for readjustment of its activities and, if the recommendations are not accepted, the duty to refer the matter to the Attorney General. On its face this provision is susceptible of the interpretation that exhaustion of the administrative procedure was intended to be a prerequisite to judicial enforcement of the Sher-

¹⁴ There is no difficulty in drawing an injunction that will leave the Board free to exercise its powers. See *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383, 412 (discussed at length by petitioners (Other Pet. Br. 35-6)).

man Act against an export association. And a legitimate primary jurisdiction argument could be made because the Commission was actually given duties in connection with the enforcement of the Sherman Act.

Petitioners in the *Alkali* case strongly urged that the congressional scheme envisioned both a preliminary administrative determination as to the lawfulness of the activities involved, and a chance for accused associations to remedy their practices before facing judicial action. This Court held, however, with but a single dissent, that the powers vested in the Commission did not impliedly curtail the Attorney General's statutory authority to institute proceedings to prevent violation of the Act. The Court said (325 U.S. 206):

A *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an anti-trust suit may appropriately be brought, would require a clear expression of that purpose by Congress.

Petitioners attempt to distinguish the *Borden* and *Alkali* cases upon the ground that the regulatory statutes which the defendants there relied upon, gave to the respective administrative agencies no power of prohibition as to the conduct charged to be in violation of the Sherman Act, whereas the Shipping Act renders unlawful agreements which do not meet its standards (Other Pet.

Br. 101-8).¹⁵ But this distinction is without significance since offenses condemned by the Shipping Act are totally distinct from the offenses condemned by the Sherman Act. As to the latter Act, the Shipping Act gives the Board no power of enforcement, just as in the *Pacific & Arctic, Borden* and *Alkali* cases the respective regulatory statutes gave no such power to the administrative agencies there involved. And particular activity may and frequently does fall within the condemnation of two or more statutes.

B. Cases barring private antitrust remedies are inapplicable in an action by the United States.

Petitioners rely primarily upon *United States Navigation Co., Inc. v. Cunard Steamship Co.*, 284 U.S. 474. The Court there held that the Shipping Act supersedes the antitrust laws with respect to *private* actions brought under Section 16 of the Clayton Act complaining of wrongs for which the Shipping Act provides a redress. But this Court made it clear that it was not passing on the right of the *Government* to prosecute actions under the antitrust laws relating to matters within the general purview of the Shipping Act (284 U.S. at 486).

¹⁵ The decision in the *Borden* case, insofar as it relates to the Capper-Volsted Act, is not within the asserted distinction. The Capper-Volsted Act gives the Secretary of Agriculture power to prevent undue restraint of trade or monopolization by agricultural cooperatives, but this Court held that the authority thus conferred (in an area common with that of the Sherman Act) was auxiliary to, rather than an implied substitute for, the provisions of the Sherman Act (308 U.S. at p. 206).

The opinion of the Court of Appeals for the Second Circuit in that case (50 F. 2d 83, 89), flatly recognized that the Government would have a right to bring a suit of the character there involved. This opinion (by Judge Augustus Hand) was cited with approval in this Court's decision as an "able and carefully drawn opinion" (284 U.S. at 481).

The primary basis of the decision in the *United States Navigation* case, with reference to private suitors, was the settled line of precedents under the analogous Interstate Commerce Act. This Court stated (p. 481):

In its general scope and purpose, as well as in its terms, that [Shipping] act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect.

The Court then reviewed the *private* remedy cases in the Interstate Commerce Act field, such as *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, and concluded that private antitrust remedies were also barred by the Shipping Act in the circumstances there presented.

If the *United States Navigation* case and the Interstate Commerce Act precedents upon which it was based are fully accepted, it does not follow that Government antitrust actions are barred. This Court has upheld actions by the United States un-

der the antitrust laws in the area subject to Interstate Commerce Commission regulation at least five times (*supra*, p. 24, n. 13) and it has at least three times strongly reaffirmed that rule in the very cases in which antitrust remedies were being denied private suitors. In *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 161-2, the Court, in a unanimous opinion by Mr. Justice Brandeis, said the following:

All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. *Los Angeles Switching Case*, 234 U.S. 294. But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States v. Trans-Missouri Freight Association*, 168 U.S. 290, and *United States v. Joint Traffic Association*, 171 U.S. 505.

In *Central Transfer Co. v. Terminal Railroad Assn.*, 288 U.S. 469, 474-5, Mr. Justice Stone, for a unanimous Court, in discussing a contention of the private petitioner that a particular matter was outside of the jurisdiction of the Interstate Commerce Commission, said:

This argument misconceives both the effect and the purpose of § 16 of the Clayton Act. Under that section jurisdiction of the Commission does not delimit the jurisdiction of the

federal courts to restrain violations of the Sherman Anti-Trust Act. Compare *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290; *United States v. Joint Traffic Ass'n*, 171 U.S. 505. *It affects only the capacity of a private party to maintain a suit to restrain violations. See General Investment Co. v. New York Central R. Co.*, 271 U.S. 228. Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, *except when the suit is brought by the Government itself.* [Italics added.]

In *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U.S. 500, another decision subsequent to that in *United States Navigation*, *supra*, this Court again held a private action under the Sherman and Clayton Acts barred where the subject matter came within the purview of the Interstate Commerce Commission. Mr. Justice Cardozo, speaking for the Court, relied upon the *United States Navigation* case as a ground of decision. After reciting the holding in *United States Navigation*, the opinion¹⁶ states (297 U.S. at 513):

The decision was that the plaintiff must seek redress by application to the Shipping Board. True, the Anti-Trust Laws, since the enactment of the Clayton Act, have been explicit in providing that any one injured by an unlawful

¹⁶ There was no dissent.

combination might have relief by injunction against threatened damage to his business. 15 U.S.C., § 26; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U.S. 37. To this there is an exception where the subject matter of the complaint is a wrong within the jurisdiction of the Interstate Commerce Commission, *in which case an injunction, if granted, must be at the instance of the government.* [Italics added.]

In *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, this Court upheld the right of Georgia to bring an action seeking injunctive relief under the Sherman Act against a number of railroads. Although the Court divided sharply on a number of issues in that case, there was no disagreement as to the basic premise that a suit by the United States based upon the same alleged offenses would lie. Chief Justice Stone, dissenting, stated (324 U.S. at 474):

Thus the Sherman Act entrusted to the national government the duty to represent the people in the vindication of their rights under the antitrust laws. And this is confirmed by § 16 of the Clayton Act, which permits injunction suits by the United States against common carriers in respect of matters within the province of the Interstate Commerce Commission, while prohibiting such suits to all others, including a State.

In the light of the above authorities it is too late to assert that there is no basis for a distinction between Government actions and private actions under the antitrust laws in areas within the jurisdiction of the Interstate Commerce Commission. And the *United States Navigation* case explicitly lays down the rule that the Shipping Act is to be construed in the light of the settled construction of the Interstate Commerce Act. See *supra*, p. 32.¹⁷ But even if this overwhelming authority were to be disregarded, and the matter were to be considered anew on its merits, we submit that the distinction between government and private actions is not the product of judicial vagary. It finds support both in statutory provisions and in reason.

Section 16 of the Clayton Act reflects a clear congressional intention to preserve the jurisdiction of the Interstate Commerce Commission against judicial interference through private actions for in-

¹⁷ Nor is it tenable to argue that if the Reed-Bulwinkle Amendment to the Interstate Commerce Act (62 Stat. 472, 49 U.S.C., Supp. IV, 5b) had been on the books at the time the above decisions were rendered, a different result would have been reached as to the right of the Attorney General to institute antitrust suits in the Interstate Commerce Act field. The exemption from the antitrust laws in the Reed-Bulwinkle Amendment, like the exemption in Section 15 of the Shipping Act, is narrowly drawn and precisely limited. Section 5a (9) (the exemption provision provides as follows (49 U.S.C., Supp. IV, 5b (9))):

"Parties to any agreement approved by the Commission under this section and others persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

junctive relief. At the same time the Section preserves Government remedies inviolate. Prior to the adoption of this Section, the Government alone was authorized to maintain a suit to restrain violations of the antitrust laws. *Paine Lumber Co. v. Neal*, 244 U.S. 459. Section 16 (*infra*, p. 47) authorized private parties to maintain such suits, but provided that no person, "except the United States," may bring suit for injunctive relief against any common carrier subject to the Interstate Commerce Act "in respect to any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." This limitation had as its "obvious purpose" precluding any interference with activities of interstate carriers subject to the Commission's jurisdiction "except when the suit is brought by the Government itself." *Central Transfer Co. v. Terminal R. R. Assn.*, 288 U.S. 469, 475.

The judicially developed rule barring private treble damage actions was in considerable measure a reflection of the Court's apprehension that if one injured shipper were allowed to recover treble damages, it might give him a preference over others. See *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, 163.¹⁸ This consideration is plainly irrelevant

¹⁸ In the *Keogh* case the Court said that recovery by a shipper in a triple damage suit under the antitrust laws would be the equivalent of a rebate, stringently prohibited by the Interstate Commerce Act. "Uniform treatment would not result, even if all said, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." 260 U.S. at 163.

in Government antitrust actions since the treble damage remedy is not available to the United States. *United States v. Cooper Corp.*, 312 U.S. 600.

Finally, the reasoning with respect to adequacy of remedy which has been applied to private suitors is not applicable to the United States. The Government does not bring an action under the anti-trust laws to remedy a private specific injury; but to vindicate public rights. It is questionable whether the United States can appear as of right as a complainant before the Board.¹⁹ *United States v. Cooper Corp.*, *supra*; *United States v. United Mine Workers*, 330 U.S. 258, 275. But whether it could or not, the remedy would be inadequate because the Board is powerless to enforce the anti-trust laws. The very denial of antitrust remedies to private plaintiffs must rest at least in part on the premise that the public interest in enforcement of those laws will continue to be vindicated by the Government. Compare Section 16 of the Clayton Act, *supra*.

¹⁹ Under the provisions and language of Section 22 of the Shipping Act, it is doubtful whether the United States, acting in its sovereign capacity, is a "person" entitled to file a complaint with the Maritime Board attacking the discriminatory character of rates adopted by steamship lines. *United States v. Interstate Commerce Commission*, 337 U.S. 426, which upheld the right of the United States to maintain an action for the recovery of injury suffered by it as a *shipper* of goods, involved altogether different considerations and statutory provisions. Nor does the United States have an adequate remedy under Section 22 merely because it may be entitled to intervene if proceedings thereunder have been instituted by a private party or by the Maritime Board.

C. There is no support in the legislative history for expanding the specific antitrust exemption which Congress provided.

The legislative history set forth by petitioners (Isthmian Br. 34-42, Other Pet. Br. 72-87) makes clear that there is no evidence of a purpose upon the part of Congress or the Alexander Committee to supersede the Sherman Act, except to the limited extent which the statute provides. The only evidence cited by petitioners which gives any comfort to their contention is the statement of Senator Cummins, in support of an amendment to delete the antitrust exemption provision which now appears in Section 15, that "This is the part of the bill which repeals the antitrust law" (53 Cong. Rec. 12815). We submit that the occasional hyperbole indulged in by opponents of a particular provision of a bill during the course of debate is not strong evidence of the meaning of the bill. As this Court observed in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394, "The fears and doubts of the opposition are no authoritative guide to the construction of legislation." Moreover, the substantial opposition to *any* exemption provision reflected in the vote as to striking the limited provision²⁰ strongly indicates that a broader exemption provision might well have been defeated.

²⁰ Petitioner Isthmian states the votes to have been as follows (Br. 41): House: 209 nays to 161 yeas; Senate 37 nays, 23 yeas.

The Alexander Committee failed to include in its report any specific recommendation with reference to exemption from the antitrust laws; accordingly, the express (and limited) exemption embodied in the Act must be taken as the best indication of what the Committee intended. To be sure, Representative Alexander stated that the Committee had chosen to recommend reasonable regulation of combinations of carriers, rather than enforcement (and, if necessary, strengthening) of the antitrust laws for the purpose of breaking up such combinations (53 Cong. Rec. 8077). But this general statement does not purport to define the scope of exemption. It is simply a statement of the Committee's basic conclusion that the conference is an institution with more virtues than vices, so that regulation rather than elimination is appropriate. And the limited exemption from the antitrust laws embodied in Section 15 fully implements that purpose. The carrier agreements which the Board lawfully approves as not unjustly discriminatory, detrimental to the commerce of the United States, or in violation of the Shipping Act are exempt from the antitrust laws. Those agreements not approved by the Board, or which are beyond the pale of possible approval under Section 15, are made unlawful under the Shipping Act and are left subject to the full force of the antitrust laws.

In a speech by Representative Burke (a member of the Alexander Committee) quoted by petitioners (Other Pet. Br. 81-2), the view is expressed that "there was no law to be found upon the statute books" (53 Cong. Rec. 8095) to deal with the "unfair practices resorted to by water carriers for the purpose of destroying competition, and of discriminating and retaliating against persons and places who would not tamely submit to their dictation" (*ibid.*). This speech reflects an erroneous view that the antitrust laws are impotent;²¹ it hardly reflects a mood conducive to aggravating the assumed impotence.

Petitioners point out that the Alexander Committee performed the major portion of its labors in the Congress that adopted the Clayton Act (Other Pet. Br. 74). It seems unlikely that in such an environment the Committee would have wished to preside over the liquidation of the antitrust laws—even *pro tanto*. To be sure, the Committee desired to supersede the antitrust laws as to "lawful" agreements sanctioned under the Act, but to impute solicitude on the part of the Committee toward those who make agreements violative of the Shipping Act is wholly unwarranted. If

²¹ The basis of this misconception may have been the somewhat slow progress then being made by antitrust litigation in this field. This Court did not finally hold the deferred rebate system violative of the Sherman Act until 1917. *Thomsen v. Caysar*, 243 U.S. 66. (See Other Pet. Br. 74-5 for history of this case.)

petitioners are to sustain the heavy burden of showing that Congress meant to exempt from the Sherman Act not only those who operate lawfully within the framework of the Shipping Act, but law breakers as well, petitioners should be able to point to some clear evidence in the legislative history to that effect. This they have not been able to do.

We do not suggest that the antitrust laws may be used as a device to interfere with the scheme of regulated competition created by the Shipping Act. But the express exemption provision of that Act is fully adequate to prevent such interference. What the Board has lawfully sanctioned, the Sherman Act leaves alone. What the Board has not lawfully sanctioned, or cannot lawfully sanction, has no claim to exemption from the Sherman Act.

It is submitted that there has been an inadequate showing to establish that Congress, when it exempted from the Sherman Act certain agreements lawfully approved under the Shipping Act, meant to include all agreements—lawful or unlawful—entered into by persons subject to the jurisdiction of the Board under the latter Act. It has not been established that "Congress intended to create 'so great a breach in historic remedies and sanctions' ". *United States v. Borden Co.*, 308 U.S. 188, 198.

CONCLUSION

For the foregoing reasons, the order denying petitioners' motions to dismiss the complaint should be affirmed.

Respectfully submitted,

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JANUARY 1952.

APPENDIX

Section 4 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations.

* * * [15 U. S. C. 4.]

The Shipping Act, 1916, 39 Stat. 728, as amended, 41 Stat. 996, 46 U.S.C. 801 *et seq.*, provides in part as follows:

Sec. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * *

Third. Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason. [46 U. S. C. 812.]

Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the [Federal Maritime Board] * * * a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof; to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this

Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action. [46 U. S. C. 814.]

Section 16 of the Act of October 15, 1914, 38 Stat. 730, 737, 15 U.S.C. 26, provides as follows:

Sec. 16. That any person, ~~or~~ firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.